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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

TRANSCRIPT OF PROCEEDINGS

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(Appearances continued on next page)

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28 **Also Present:**

29 Deborah Miller

30 Andrew Temkin

31 Oracle America, Inc.

1 Thursday - May 5, 20161 9:34 a.m.2 P R O C E E D I N G S3 ---000---4 **THE CLERK:** Calling civil number 10-3561, Oracle
5 America Inc. versus Google Inc. The matter is on for a final
6 pretrial conference.7 Counsel, can you please state your appearances for the
8 record.9 **MR. BICKS:** Good morning, Your Honor. Peter Bicks
10 from Orrick for Oracle. And I'm happy to introduce my team.11 **THE COURT:** Please, go ahead.12 **MR. BICKS:** Ms. Hurst you know.13 **MS. HURST:** Good morning.14 **MR. BICKS:** Ms. Caridis --15 **MS. CARIDIS:** Good morning.16 **MR. BICKS:** -- who you met before.

17 Gabe Ramsey.

18 **MR. RAMSEY:** Good morning.19 And Trudy Harris I've introduced. She does courtroom
20 technology.21 And Matt Bush. He was a younger lawyer who argued the
22 Kearn motion before Your Honor.23 **MR. BUSH:** Good morning.24 **MR. BICKS:** And Ms. Simpson you know.25 **MS. SIMPSON:** Good morning, Your Honor.

1 **MR. BICKS:** And then Deborah Miller and Andrew Temkin,
2 in-house from Oracle, are here.

3 **THE COURT:** Okay. Where is Ms. Ramsey? Is she here?

4 **MR. BICKS:** Mr. Ramsey, Gabe.

5 **MR. RAMSEY:** Right here, sir.

6 **THE COURT:** Okay. Good.

7 Over on your side.

8 **MR. KWUN:** Your Honor, Michael Kwun, of Keker &
9 Van Nest, for Google.

10 With me at counsel table is Matthias Kamber.

11 **MR. KAMBER:** Good morning.

12 **MR. KWUN:** Gene Paige, also from Keker & Van Nest.

13 **MR. PAIGE:** Good morning, Your Honor.

14 **MR. KWUN:** Heather Meeker of O'Melveny & Myers. And
15 Renny Hwang, in-house at Google.

16 **THE COURT:** All right. So we're here for the
17 questions that I sent out to deal with General Public License
18 Version 2 plus Classpath Exception. I'm trying to understand
19 this better. So what I'd like to do is go through these
20 questions one by one, more or less in the order that we have
21 them here.

22 Who's going to speak for each side?

23 **MR. KWUN:** I will be speaking for Google, Your Honor.

24 **MS. CARIDIS:** And I will be speaking for Oracle, Your
25 Honor.

1 **THE COURT:** All right. Why don't you both come up
2 here. I think it will be easier if we do that.

3 So identify yourselves again.

4 **MS. CARIDIS:** Alyssa Caridis for Oracle.

5 **THE COURT:** Caridis.

6 **MS. CARIDIS:** Caridis, yes.

7 **MR. KWUN:** And Michael Kwun for Google.

8 **THE COURT:** K-w-u-n?

9 **MR. KWUN:** K-w-u-n, yes, Your Honor.

10 **THE COURT:** First question: Precisely when and how
11 was the classpath exception first extended by Sun to the 37
12 APIs in question?

13 **MS. CARIDIS:** Sun released the source code for the
14 Java SE class libraries under GPLv2 with Classpath Exception.
15 And the way that you do this is you release the source code,
16 you publish the source code.

17 And at the top of each source code file is a header that
18 includes the license information. So that's what conveys to
19 developers and to anyone using the code the license that
20 applies to that code.

21 **THE COURT:** All right. Okay. You said it perfectly
22 right or well, but it went by me too fast. You said -- what
23 was it, again, SE? Say it again.

24 **MS. CARIDIS:** The Java SE class libraries, so the API
25 packages that we're talking about here.

1 **THE COURT:** Okay.

2 **MS. CARIDIS:** And it's for -- for Java 6, for JDK 6.

3 And that was done under the GPLv2 with Classpath Exception.

4 **THE COURT:** I'm sorry, the word 6 got in there. I
5 thought JDK was something else. This is the OpenJDK?

6 **MS. CARIDIS:** Sorry. This was all OpenJDK. It was
7 based on Java Version 6.

8 **THE COURT:** All right. So this was the May 8, 2007,
9 was when Java -- sorry, OpenJDK got --

10 **MS. CARIDIS:** Released.

11 **THE COURT:** -- released.

12 Is that right? What's your version?

13 **MR. KWUN:** I agree with that. The only additional
14 point I would make is that it was announced that Open JDK would
15 be open sourced in November 2006. But I agree that the actual
16 release happened in May of 2007.

17 **THE COURT:** Okay. So November '06 was the
18 announcement that it was forthcoming. And then May 8th was the
19 actual release date?

20 **MR. KWUN:** Yes, Your Honor.

21 **THE COURT:** And that was for open JDK?

22 **MR. KWUN:** Yes, Your Honor.

23 **MS. CARIDIS:** Agreed, Your Honor.

24 **THE COURT:** Okay. Good. Second question: When and
25 how did GNU do so?

1 **MS. CARIDIS:** So, Your Honor, Oracle's position is
2 that GNU did not have the authority to publish or distribute
3 APIs under different license terms than what Sun was
4 distributing at the time.

5 That being said, GNU released an in-progress
6 implementation of the Java SE class libraries under GPLv2 with
7 Classpath Exception in the beginning of 2002.

8 **THE COURT:** I want to come back to your point, but
9 let's nail down the date.

10 What do you say?

11 **MR. KWUN:** I would agree that the wording of the
12 Classpath Exception that currently exists, that that came into
13 existence on January 22nd, 2002.

14 But earlier releases of the GNU Classpath Project,
15 starting in March 15, 2000, included language that is very
16 similar to the Classpath Exception as we now see it. And prior
17 to March 15, 2000, the GNU Classpath Project was licensed under
18 a different open source license that also had a linking
19 exception. And that was --

20 **THE COURT:** Is that for just everything that GNU had
21 on its website? Or was this specifically for the 37 APIs in
22 question?

23 **MR. KWUN:** So on -- well, first of all, GNU has a lot
24 of different projects on its website. So we need to focus on
25 the Classpath Project, which has the class libraries.

1 **THE COURT:** Just a second. See, you all know so much.

2 And you're assuming I know, but I don't.

3 So are you telling me that there was a Java-only website
4 at GNU, and that's all it had on that website, on the Classpath
5 Exception, was Java? That's what I'm trying to get at. When
6 was Java first put onto Classpath Exception by GNU?

7 **MR. KWUN:** Yes, Your Honor. So GNU is an organization
8 that publishes a variety of projects of the Free Software
9 Foundation.

10 In 1998, the Free Software Foundation started the GNU
11 Classpath Project. The GNU Classpath Project is on the GNU
12 website. And it has a set of pages that are specifically
13 devoted to GNU Classpath.

14 GNU Classpath is a set of class libraries for Java. So
15 it's only for Java. It has nothing to do with any other
16 language.

17 In 1998, they were not yet using the Classpath Exception.
18 They were using something that, at the time, was known as the
19 GNU Library General Public License, which included something
20 that is commonly known in the open source community as a
21 linking exception.

22 And in 1998, when they started the project, they did not
23 have all 37 of the API packages. They started with a few.
24 Very quickly they had 10 or 12. But their goal from day one
25 was to implement all of the API packages in Versions 1.1 and

1 1.2 of Java, as it consisted then, and with the goal of
2 updating that as necessary. So that was 1998.

3 In March of 2000, March 15th of 2000, they changed the
4 license language that's in the files for the classpath
5 libraries that are part of GNU Classpath. And the change is
6 not identical to the current language, but it's very similar to
7 the Classpath Exception. So that was March 15, 2000.

8 And then on January 22nd, 2002, they changed that language
9 again. And the annotation they had when they did that was that
10 it was a license clarification. And the language got a little
11 longer. And at that point the language was the same as we
12 currently have for the Classpath Exception.

13 **THE COURT:** January 22, '02.

14 **MR. KWUN:** Yes, Your Honor.

15 **THE COURT:** So that was when the Classpath Exception,
16 as we know it today, or at least as it's worded, got applied to
17 the Java APIs. Right? Or not right?

18 **MR. KWUN:** The Java APIs as implemented by GNU
19 classpath, yes.

20 **THE COURT:** Did that include all 37 at that point?

21 **MR. KWUN:** In 2002, I believe they still did not have
22 all 37 of the ones that are at issue here, but they had quite a
23 large number of them.

24 Sometime around 2005, or so, I believe they had all 37.

25 **THE COURT:** Well, when in 2005?

1 **MR. KWUN:** I believe by November 2005, at least, they
2 had all 37.

3 **THE COURT:** You say that. GNU -- is that the way you
4 say it, GNU?

5 **MR. KWUN:** They do pronounce it GNU, Your Honor.

6 **THE COURT:** You said GNU had its own implementations;
7 is that right?

8 **MR. KWUN:** Yes, Your Honor.

9 **MS. CARIDIS:** Your Honor, I think it might be more
10 accurate to say that they were working to create their own
11 implementation. But even to this day, they never completed a
12 full implementation of what they were aiming to do.

13 **THE COURT:** Okay. But let's just take one where they
14 actually did complete it. I assume they must have had some
15 completed back then. Right?

16 **MS. CARIDIS:** (Shakes head.)

17 **THE COURT:** No?

18 You mean they didn't have any method reimplemented? I
19 don't understand what you're trying to say.

20 **MS. CARIDIS:** Your Honor, since the inception of the
21 Classpath Project, it was always the Project's goal to create a
22 complete, full implementation of all of the packages in Java
23 Versions 1.1 and 1.2. And even to this day, that goal has not
24 been completed. There has not been an official public, Here is
25 a complete implementation release of the Classpath Project.

1 **THE COURT:** So why -- help me understand. This is --
2 this is stepping back even further.

3 So why -- why were they -- why didn't they just put it on
4 there like the way you had it, your company had it? Why did
5 they want to reimplement anything? What's the point of
6 reimplementing it? Is it to get around the copyright? Is that
7 it? What was -- what was in people's mind at the time as to
8 why you would want to reimplement it? I've been trying to
9 figure this out.

10 One explanation is they want to avoid copyright
11 infringements even though they didn't know the header lines
12 were copyrightable. So they figured they would just
13 reimplement.

14 I don't know. That's one explanation.

15 Another explanation would be that they thought they could
16 do it a better way they could write more efficient code that
17 would be shorter and take less computer time to do the -- get
18 to the same bottom line as the implementing code that Java had.

19 I'm trying to understand. Why would people be so
20 interested in having this reimplemented? Let's hear your
21 version.

22 **MS. CARIDIS:** So, Your Honor, Sun's specification
23 license -- which was available at the time that this all
24 happened, and which is where the GNU Classpath Exception
25 project took the declaring code and the SSO from -- the

1 specification license allows you to reimplement the APIs. It
2 allows you to take the declaring code and the SSO and write
3 your own implementing code.

4 And, as Your Honor suggested, one reason to do this is
5 because you are attempting to use the libraries in a different
6 environment or a different type of device. And maybe you think
7 that you can write the implementing code better.

8 Also, if you take the specification license, you have to
9 pass the requirements of the specification license, which
10 include full compatibility and passing the TCK, but you don't
11 have to pay the commercial license fees that you had to pay if
12 you took Sun's implementing code.

13 So taking the specification license -- which the head of
14 GNU Classpath Project recognized that the APIs had a
15 specification license -- allowed you to write your own
16 implementing code while using the copyrighted declaring code
17 and SSO of the API packages.

18 **THE COURT:** All right. So did GNU have a
19 specification license?

20 **MS. CARIDIS:** They never completed the requirements of
21 the specification license. As I noted, they were always
22 working towards full compatibility, which is -- which is one of
23 the requirements of the specification license.

24 The Sun developers within GNU Classpath Project recognized
25 that there was a specification license and that they needed to

1 abide by it.

2 **THE COURT:** Did they start out with -- what was step
3 one?

4 Here's what I'm imagining. Help me on this. Somebody is
5 sitting around GNU, and they say, Here's a grand idea. Let's
6 do our own version of Java. And somebody else says, But we
7 need a specification license.

8 So they get in the car, they drive over to Sun. They
9 knock on the door and they say, Can we have a specification
10 license? That's step one. And then, We'll call you a few
11 months from now, when we've done all the implementing, and then
12 you bring your TCK thing over and we'll pass the test.

13 That's what I'm imagining going on. I can't tell from the
14 way you describe it. It almost sounds, from the way you
15 described it, they blew off Sun altogether, they didn't get a
16 license upfront, and just started reimplementing. I don't
17 know.

18 Tell me what happened there.

19 **MS. CARIDIS:** Sure. So the API specifications are
20 published by Sun. So that includes the declaring code and the
21 SSO.

22 In that publication, whether it be by book or on the
23 website, there is a clear notice that says you are using -- you
24 know, if you use this specification you are doing so pursuant
25 to the specification license.

1 And so in order to reference and use the -- the
2 Sun-published API specifications, it was necessary -- a
3 condition of using those specifications was taking the
4 specification license.

5 So there's no actual signed agreement.

6 **THE COURT:** Okay. Thank you.

7 You just helped me understand something that none of you
8 lawyers have ever helped me understand; that you could go buy a
9 book someplace and you could see all of this code right there.

10 **MS. CARIDIS:** Yes, Your Honor. There was a clear
11 notice --

12 **THE COURT:** Okay. Let's say there's a gigantic, in
13 big bold print, that says, "You can't do this without a
14 license." Okay. But no one ever told me that before.

15 Is that the way GNU got it to begin with, they copied it
16 out of a book?

17 **MS. CARIDIS:** We have evidence that says that is how
18 they were operating.

19 **THE COURT:** What do you think? How did GNU get it?

20 **MR. KWUN:** Your Honor, they did rely on specifications
21 that were published by Sun. I actually don't believe that
22 there was a specification license that was mandatory, that was
23 published on the website, which is actually where they went.

24 I can't guarantee that none of the developers ever looked
25 at a book. But the Project published guidelines that they

1 expected the programmers who were contributing code to the
2 Classpath Project to use.

3 I have a copy of the web page at which they set out the
4 guidelines, if you would like a copy.

5 **THE COURT:** I didn't -- wait, wait. What is -- give
6 me the point you're trying to make, again. You're saying it
7 okay, but --

8 **MR. KWUN:** I'll try again.

9 **THE COURT:** I'm still back on the book. Okay. Say it
10 again.

11 **MR. KWUN:** So, Your Honor, when they started the GNU
12 Classpath Project, they created a guide which they called the
13 hacker's guide. And the hacker's guide -- "hacking" in the
14 programming community is often viewed as a nonpejorative
15 phrase.

16 But the hacker's guide explained why they were creating
17 the Classpath Project, what the reason was, that they wanted to
18 reimplement. It explained what they should not do to make sure
19 that, in the belief of the Project, they would not run afoul of
20 Sun's IP.

21 And it also said where they could get the specifications
22 from and listed what they call the canonical sources.

23 **THE COURT:** The what?

24 **MR. KWUN:** The canonical sources --

25 **THE COURT:** What is that?

1 **MR. KWUN:** -- for the specifications.

2 They listed in order the preferred places to find out what
3 the specifications were. And the --

4 **THE COURT:** You're dodging the point. Come on.

5 Was there a website at Sun where you could download the
6 code, API code? And, if so, did that have the notice saying
7 you have to -- you can only get this via the specification
8 license?

9 **MR. KWUN:** There was a website. The sources that they
10 identified for use by the developers included Sun websites. It
11 included, actually, several Sun websites. That's the first
12 point.

13 The second point, as far as I can tell from reviewing
14 these pages which no longer exist in their original locations
15 on the Internet, but as far as I can tell by looking at the
16 Internet archives, stored copies of old versions of these Web
17 pages, there was no requirement for you to click through a
18 license to get to it. I couldn't actually even find the
19 license when I went to the page.

20 But, more importantly, the specification license does not
21 say, By reading this website you are subject to the
22 specification license.

23 It says, We will give you certain IP rights if you do the
24 following. It's a voluntary license that you can adopt if you
25 want, if you want those IP rights.

1 If you believe you do not need those IP rights, you don't
2 need to agree to the license. Matter of fact, there is nothing
3 you ever sign to say, I am assuming the obligations of this
4 license.

5 **THE COURT:** Wait a minute. You're saying that that's
6 true even today?

7 **MR. KWUN:** For -- it certainly is true, for example,
8 if you buy the book. If you buy the book, you don't have to
9 sign anything and send it in.

10 And the specification license that's in the front of the
11 books that I have seen --

12 **THE COURT:** Let me see the book. Anybody got the
13 book?

14 **MS. CARIDIS:** No, Your Honor.

15 **THE COURT:** All right. So your view -- so now you're
16 sliding off again. I asked question number 1, and you slide
17 off to question number 2.

18 Answer my question. Did the website back then -- what did
19 the website back then say about a license?

20 **MR. KWUN:** I could not find a license on the website
21 back then.

22 **THE COURT:** All right. Okay. That's a fourth right
23 answer. You just don't know. You've looked. You can't find
24 it.

25 All right. What did the book say?

1 **MR. KWUN:** The books that were published back then, in
2 the initial pages where you would normally see a copyright
3 notice and the name of a publisher, they included some
4 boilerplate-looking text. And that text was similar to
5 portions of the specification license. It was not the entirety
6 of the specification license.

7 **THE COURT:** So what if it's boilerplate. It's English
8 language. And we've got to go with something. So what did it
9 say?

10 **MR. KWUN:** Again, it said that if you wanted to create
11 an independent implementation, Sun would give you certain
12 intellectual property rights if you did certain things.

13 There is nothing in there that says you cannot read this
14 book, you cannot use this book unless you agree to this
15 license.

16 **THE COURT:** Is that right, Ms. Caridis?

17 **MS. CARIDIS:** The Java API specifications have always
18 said you have to use it -- you're using this code subject to
19 the specification license.

20 Anybody can read the specification. But if you are going
21 to copy and reimplement it, the Java specification license says
22 you're allowed to reimplement it if you do these certain
23 things.

24 And, Your Honor, if I can pass up to you an email
25 exchange --

1 **THE COURT:** My law clerk will go over and get it.

2 **MS. CARIDIS:** -- from the GNU Classpath --

3 **THE COURT:** See, you're sliding off too. You ought to
4 give me -- everybody always resorts to the best email in the
5 other side's file.

6 I would like to see the -- all right. I see your point.
7 But, see, every time I ask a question you don't have the book
8 here. You give me somebody -- some pointy-headed bureaucrat on
9 the other side's file who made a mistake, maybe, in the way
10 they worded something.

11 Possibly this is great evidence. But I would like to see
12 the original sin.

13 Can't you show me what's in the book?

14 **MS. CARIDIS:** So, Your Honor, I do not have the book
15 with me.

16 **THE COURT:** All right.

17 **MS. CARIDIS:** I have a copy of the specification
18 license itself, which you can access to by clicking the --

19 **THE COURT:** All right. That will be useful. Let me
20 see that.

21 All right. So what is the most pertinent part of this
22 license?

23 **MS. CARIDIS:** Your Honor, excuse me one minute. Let
24 me get another copy.

25 **THE COURT:** Do you have a copy over there, Mr. Kwun,

1 of any of these books?

2 **MR. KWUN:** I do not.

3 **MS. HURST:** Your Honor, we are getting one from the
4 office. And we will have it here, hopefully, in 15 minutes.

5 **THE COURT:** Great. Thank you.

6 Do you have back at your office any of the books that will
7 back up what you told me?

8 **MR. KWUN:** Yes, Your Honor.

9 **THE COURT:** So you could have one here in 15 minutes
10 too.

11 **MR. KWUN:** Actually, Your Honor, what I have back at
12 the office is a copy of a book that was marked as an exhibit in
13 a depo. I suspect -- Oracle marked it as an exhibit. It might
14 be the very same book that is coming in.

15 **THE COURT:** Okay. Go ahead.

16 **MS. CARIDIS:** So, Your Honor, in Trial Exhibit 610.1,
17 which is Sun Specification License, in the second paragraph
18 starting "Sun also grants," it reads:

19 "Sun also grants you a perpetual nonexclusive worldwide
20 fully-paid-up royalty-free limited license without the right to
21 sublicense under any applicable copyright or patent rights it
22 may have in the specification to create and/or distribute an
23 independent implementation of the specification."

24 So this is Sun's granting to users of the specification
25 the right to create or distribute an independent implementation

1 that meets three criteria that are enumerated following.

2 If your independent implementation does not meet these
3 three criteria, you do not have a right to create and/or
4 distribute an independent implementation.

5 **THE COURT:** Okay. What do you say to that?

6 **MR. KWUN:** So, Your Honor, the grant is just that.
7 It's a grant of rights. It says, If you do these three things,
8 I will give you broad intellectual property rights, whatever is
9 necessary, that I, Sun, have, for you to practice this
10 specification.

11 What it doesn't say is that, I hereby prohibit you from
12 using this material otherwise. It's merely, If you do not take
13 this license, if you do not comply with these items, the three
14 requirements, then you are not getting that broad grant. You
15 are not getting the patent rights, for example. You are not
16 getting trademark rights. And to the extent there are
17 copyright issues, you're not getting copyright protection
18 either.

19 But nothing in here says your use of this book, your use
20 of this material is conditioned on you agreeing to the
21 following terms.

22 **THE COURT:** Well, what about, Ms. Caridis says that if
23 you looked at the specification, the declaring -- maybe I
24 misunderstood.

25 Ms. Caridis, listen to what I'm about to say because I may

1 have misunderstood you.

2 I thought she said that when you look at the lines of code
3 themselves, that there are comments in the margin that say this
4 cannot be used except under the specification license. Or
5 something like that.

6 Maybe I misunderstood what your point is. But how close
7 did I get to what you're saying?

8 **MS. CARIDIS:** Your Honor, the specification -- I'm
9 looking at the website right now that has the Java API
10 specification for Java 5. And at the bottom it says, "Use is
11 subject to license terms."

12 And the license terms is a hyperlink. And if you click
13 that hyperlink, you get to TX 610.1.

14 **THE COURT:** That's the way it is now. But is that the
15 way it was back then?

16 **MS. CARIDIS:** I can get the exact language for you,
17 but there was something similar. And it was in the book, as
18 well, which we will see in a little bit.

19 **THE COURT:** Okay. So Mr. --

20 **MR. KWUN:** Kwun, Your Honor.

21 **THE COURT:** -- Kwun, is that true?

22 That's exactly opposite of what you were telling me.

23 **MR. KWUN:** Your Honor, I could not find -- when I went
24 to the archived version from the Internet archive of the
25 specification pages on the Sun website from approximately 1998,

1 I could not find a reference to the specification license.

2 So I do not believe that is correct.

3 **THE COURT:** All right. I want to see -- when the book
4 gets here, that will be useful to look at. All right. We're
5 going to come back to that.

6 Now we're back to GNU, and I want to summarize in my own
7 words what I understand your respective positions to be. Okay.

8 Ms. Caridis says that GNU got its hands on the declaring
9 code in SSO. And the only way they could have done that was by
10 implicitly agreeing to these terms of the specification license
11 even though they didn't sign on the line.

12 And they -- GNU has never complied with the conditions
13 that are laid out here, including the TCK. So it's just a work
14 in progress that hasn't come to fruition, and they don't have a
15 license, and they are not authorized to give anything away,
16 period.

17 That's your position.

18 **MS. CARIDIS:** (Nods head.)

19 **THE COURT:** Your position over there is they didn't
20 need a license. It was already contributed to the public
21 domain in the way in which it was not caveated or worded or
22 whatever. And the people at GNU, the people at GNU just forged
23 right ahead and didn't need a license to begin with. And there
24 was nothing in there.

25 All right. So now let's come to this email that you gave

1 me. Right?

2 **MS. CARIDIS:** Yes, Your Honor.

3 **THE COURT:** Is this from within the GNU people?

4 **MS. CARIDIS:** Yes, Your Honor.

5 **THE COURT:** All right. So the GNU -- somebody named
6 David Holmes, in '04, said:

7 "I think you will find that all the Java
8 specifications are protected by a similar license, which
9 basically preserves the namespace usage and requires
10 complete conformance from an implementation. Even specs
11 that get printed will have a license included in the book.
12 Only third-party books that describe an API will not have
13 such license, but nor are they definitive sources of
14 information on an API specification. Best get this
15 cleared through FSF legal ASAP."

16 Okay. What do you say to that?

17 **MR. KWUN:** Your Honor, David Holmes was not deposed.

18 He was not identified as a witness. He has not been subpoenaed
19 by either party.

20 We -- I mean, this is just hearsay. I don't know what was
21 in David Holmes' mind. I don't know what his role was. I
22 don't know any of the foundation.

23 **THE COURT:** You don't know anything. You don't know
24 anything. But I've got an email in my hands that seems to
25 contradict what you're telling me.

1 **MR. KWUN:** The other thing is I would like to hand up
2 to the Court the FAQ that Sun published, that it announced that
3 it would be open sourcing Java.

4 **THE COURT:** Wait. This is my later -- I'm not going
5 to look at it now.

6 **MR. KWUN:** Okay.

7 **THE COURT:** See, you're sliding off. That's what they
8 always do.

9 **MR. KWUN:** I am happy to address it --

10 **THE COURT:** Slide off and they never answer my
11 question.

12 We're going next to: What in the GPLv2 would have
13 barred/allowed any company from developing and distributing a
14 product generally like Android in the commercial way that
15 Google did for Android?

16 Okay. Let's -- since you're the one that thinks it
17 allowed it, Mr. Kwun, you tell me, hand up to me a copy of the
18 actual license with highlighted info on it.

19 **MR. KWUN:** Here's a copy with the highlighting I have
20 just given to Judge Alsup.

21 Just to be clear, the yellow highlighting on this document
22 are highlights I've added. They are not in the original
23 document.

24 **THE COURT:** All right.

25 **MR. KWUN:** This is the GNU General Public License

1 Version 2 with the Classpath Exception.

2 Just to orient Your Honor to how that works, the first few
3 pages, the first --

4 **THE COURT:** By the way, is this the same one that
5 would have applied to OpenJDK?

6 **MS. CARIDIS:** Yes, Your Honor.

7 **MR. KWUN:** Yes, Your Honor.

8 **THE COURT:** Okay. Good. Go ahead.

9 **MR. KWUN:** First of all, the wording is exactly the
10 same -- other than a reference to Oracle in one spot, the
11 language is the same as published on the Free Software
12 Foundation website.

13 Second of all, this is actually how Oracle publishes it as
14 the license for OpenJDK. This is from the OpenJDK --

15 **THE COURT:** Well, it says "OpenJDK" right here.

16 **MR. KWUN:** Yes. This is from the OpenJDK website.

17 So the first four-and-a-half pages of this document are
18 the GNU General Public License Version 2. And starting halfway
19 down page 5 -- actually, two-thirds of the way down page 5, is
20 the Classpath Exception.

21 **THE COURT:** Page 5?

22 **MR. KWUN:** Yes. If you look at the trial exhibit
23 number at the bottom.

24 **THE COURT:** All right.

25 **MR. KWUN:** And it's highlighted. You will see

1 "Classpath Exception to the GPL."

2 **THE COURT:** All right.

3 **MR. KWUN:** So if you had stopped right before you got
4 to that line, then you would have the GNU General Public
5 License Version 2.

6 And then here is the exception that has been added. And
7 this exception is also published by the Free Software
8 Foundation and has been adopted by, first, Sun and now Oracle
9 for purposes of OpenJDK.

10 But it may be useful to start back on page 1, now that we
11 figured out what the two parts of this are, Your Honor.

12 And so, first of all, there's a preamble to the General
13 Public License Version 2. And you'll see that I've highlighted
14 some text there. It says, "When we speak of free software we
15 are referring to freedom, not price." And it says that, "You
16 have the freedom to distribute copies of free software and
17 charge for this service if you wish."

18 So one of the things that was in Your Honor's question was
19 whether or not there was -- or at least I understood it to be
20 asking whether or not there was a problem with the fact that
21 Android is commercial.

22 So the fact that Android is down the line a commercial
23 enterprise is not inconsistent with the license at all. Matter
24 of fact, the license assumes that you may choose to make
25 commercial use of the free software.

1 The -- if you go down to the bottom of page 1, this is
2 where the terms of the license actually begin after the
3 preamble. And they have Section 0. And they refer to -- they
4 define a term called "Program," capital P. And they say that:

5 "Program below refers to any such program or work," which
6 is to say the Program that is being licensed. "And a work
7 based on the Program means either the Program or any derivative
8 work under copyright law."

9 And they use this phrase "based on the Program or work
10 based on the Program" several times throughout the license.

11 So if you turn to the next page, and we get to Section 1,
12 Section 1 isn't highlighted simply because it's not as directly
13 important for our purposes.

14 Section 1 talks about your rights if you want to
15 distribute a verbatim copy of the program source code. So, in
16 other words, you get the source code and you want to just
17 republish it as is. And it says you can do that.

18 And if you want to do that, you have to make sure that
19 your publication is subject to the same obligations and
20 requirements as they're being imposed on you. So that's
21 Section 1.

22 Because we're not talking about situations in which
23 somebody is just publishing verbatim copies of code, this is
24 not as directly relevant to us.

25 But I do note here that it says, "You may charge a fee for

1 the physical act of transferring a copy." So, again, they note
2 the fact that there might be monetary transactions involved is
3 not inconsistent with the license.

4 Section 2 is -- and then Section 3 are more interesting
5 for our purposes.

6 So Section 2 says that, "You can modify your copy of the
7 Program," capital P Program, "or any portion of it, thus
8 forming a work based on the program. And you can copy and
9 distribute such modifications or work under the terms of
10 Section 1 above, provided that you also meet all of these
11 conditions." And then it has an (a), (b) and (c).

12 And all of them obviously must be met. But, again, for
13 our purposes, Section (b) is probably the most interesting,
14 which it says, "You must cause any work that you distribute or
15 publish, that in whole or part contains or is derived from the
16 Program, or any part thereof, to be licensed as a whole at no
17 charge at all to third parties under the terms of this
18 license."

19 So, in other words, third parties get a license to your --
20 to your modified version without having to pay a fee.
21 Although, it's still true that if you want to charge a fee for
22 some other reason, you can do that. But you have to publish
23 that code somewhere where they can get it for free if they want
24 to.

25 So then there's a -- after (a), (b) and (c), these

1 requirements for modified versions of the source code, there
2 are a couple of -- there are paragraphs actually explaining
3 this a little more.

4 And it notes immediately after section (a), (b) and (c),
5 that "These requirements" -- so that means (a), (b) and (c) --
6 "apply to the modified work as a whole."

7 So, in other words, you took the program that was
8 licensed, you modified it. These terms apply not just to the
9 original code you were given, but also to any modifications you
10 make. Modified work as a whole.

11 And there's a description there of what those obligations
12 mean. And I'm not going to go into that unless Your Honor has
13 some questions. But then in the third paragraph after the
14 three requirements it says, "In addition." And it says:

15 "In addition, mere aggregation of another work not based
16 on the Program with the Program or with a work based on the
17 Program on a volume of storage or distribution medium does not
18 bring the other work under the scope of this license."

19 That's a mouthful, but what that's saying is that if you
20 distribute -- say, on your server you distribute your modified
21 version of the license code, and say that's in a file called A,
22 and on that same server, maybe even in the same directory, you
23 have another file called B, and B is something you wrote, it's
24 not based on the Program, it doesn't copy code from the
25 Program -- it's not a derivative work of the Program is the key

1 thing -- the fact that they are distributed side by side in the
2 same directory is a mere aggregation.

3 So that does not mean that B, which is not a derivative
4 work of A, is subject to requirements (a), (b) and (c). So
5 that's the mere aggregation clause.

6 And then we have Section 3. So we had Section 1, which
7 was about distributing verbatim copies of the source code. We
8 have Section 2, which is about modified versions of the code.
9 And then we have Section 3.

10 And just to call out the Sun text, I gave it a slightly
11 different color. But I'm just going to read the text from
12 Section 3, which says:

13 "You may copy and distribute the Program or a work based
14 on it under Section 2 in object code or executable form under
15 the terms of Section 1 and 2 above provided that you also do
16 the following."

17 So I'm going to stop there for a moment. This is talking
18 now not about source code. Object code or executable form both
19 refer to code that is machine readable. For Java, that would
20 mean it would be in bytecode. So it's no longer source code
21 that we're talking about.

22 And for Section 3 it says:

23 "If you are going to distribute code in object code or
24 executable form that either is the Program or is based on the
25 Program" -- which, again, it's defined to mean a derivative

1 work of the Program -- "You must do one of the following."

2 And it has three possible ways that you could satisfy the
3 obligation you have. I've highlighted one of them, which is
4 Section (a) under Section 3, which is:

5 "Accompany it with a complete corresponding
6 machine-readable source code, which must be distributed under
7 the terms of Section 1 and 2 above on a medium customarily used
8 for software interchange."

9 So what that's saying is if you were going to give someone
10 an executable program -- which could be an app; it could be an
11 application -- you have to also give to them the source code
12 for that program. And the idea being that then that person can
13 do what they want with the source code.

14 And we know that they can do what they want with that
15 source code because the source code must be distributed under
16 the terms of Section 1 and 2 above. And Section 1 and 2 both
17 require that your code, when you distribute it, be subject to
18 the same terms and conditions as the original program. And
19 that means GPLv2.

20 So that's Section 3. Those are actually the license
21 grants in the GNU General Public License.

22 After that we have Sections 4, 5, 6 and 7, on the next
23 page, that talk about various other conditions/situations in
24 which a license might terminate. Things like that. But it's
25 Sections 1, 2 and 3 that are the affirmative grants of a

1 license.

2 And then we have -- actually, if you turn on to the next
3 page, we have Section 8 and 9. We have a disclaimer of
4 warranty. And then it says "Terms and Conditions." Then there
5 is some text that says how to apply these terms to your new
6 programs.

7 These are not, obviously, part of the terms and
8 conditions, since it's just said that we have reached the end
9 of the terms and conditions. This is basically explaining that
10 if you want to use this license for your own code, how you
11 would go about doing that.

12 Now, that description continues on to page 6, until we
13 finally get to the Classpath Exception.

14 So the Classpath Exception, first of all, there is a
15 paragraph that says certain source code files -- excuse me,
16 "Certain source files distributed by Oracle America and/or its
17 affiliates are subject to the following clarification and
18 special exception to the GPL.

19 And it explains, as Ms. Caridis also explained, that the
20 way that is done is by putting text in the actual source code
21 file, at the top of it.

22 **THE COURT:** Say that again.

23 **MR. KWUN:** This is the license that is published on
24 the website. But the Classpath Exception applies specifically
25 to any OpenJDK file that, within the body of the file itself,

1 says that the Classpath Exception applies.

2 So they're providing it to you here, but you have to look
3 at each individual file to know whether the Classpath Exception
4 applies to that file.

5 As it turns out, the Classpath Exception applies to every
6 source code file in OpenJDK for the class libraries.

7 But the actual Classpath Exception is then immediately
8 after the certain source files paragraph. And it has two
9 paragraphs. And the first paragraph explains why you would
10 need the Classpath Exception. And it says:

11 "Linking this library statically or dynamically with other
12 modules is making a combined work based on this library. Thus,
13 the terms and conditions of the GNU General Public License
14 covers the whole combination."

15 Go so the "based on this library" is a call back to the
16 definition of Section 0 of the General Public License, which
17 says that a work based on the Program is one that is a
18 derivative work under copyright law.

19 So what they are saying is if you take this library -- the
20 library is the thing that is being licensed under GPLv2. So,
21 again, I'm going to call that A. If you take this library A
22 and you link it statically or dynamically with your own
23 module -- we'll call that B. So you wrote the code in B, but
24 you link it with A, when you do that act of linking, the act of
25 linking creates a combined work.

1 And, thus, the provisions that say the combined work must
2 be licensed under the terms of Section 1 or Section 2, that's
3 in Section 3 of the GNU General Public License, that would
4 ordinarily kick in.

5 So you would have an obligation, if you distributed your
6 linked combined work, if you distributed that, you would have
7 an obligation to supply people with the source code not just
8 for A, but also for B, which is your code.

9 So that's what it says here. And then it says, "As a
10 special exception" -- so, in other words, we have this rule
11 about combined works, but now we're going to create an
12 exception.

13 "As a special exception, the copyright holders of this
14 library give you permission to link this library with
15 independent modules to produce an executable, regardless of the
16 license terms of these independent modules, and to copy and
17 distribute the resulting executable under terms of your choice,
18 provided that you also meet for each linked independent module
19 the current terms and conditions of the license of that module.
20 An independent module is a module which is not derived from or
21 based on this library."

22 So what that says is if B, the thing that is linked with
23 A, the licensed code, if B is an independent module -- which
24 we've just been told means it is not derived from or based on
25 A -- the library, if it is an independent module and the

1 license terms for B, which if you are the author of it you
2 choose your own license terms, but the license terms don't say
3 anything about prohibiting you from combining these products
4 together -- that you do not have to license B under the General
5 Public License Version 2.

6 And we know that because it says that you can do this
7 linking regardless of the license terms of these independent
8 modules.

9 So, for example, their independent module B, you could
10 keep it under a completely proprietary license that allows no
11 one to look at the source code for it, other than you. So
12 that's one possibility.

13 You could also -- and then you would distribute it only in
14 executable or object code form.

15 You could also say, I am going to open source B, my
16 independent module, but I'm not going to use the GNU General
17 Public License Version 2. I'm going to use a different open
18 source license.

19 For example, you could say, For B I am going to provide
20 everyone with the source code, but I am going to provide it
21 under the Apache Software License Version 2 instead of the GNU
22 General Public License Version 2.

23 So the exception here basically creates a firewall that
24 says once you reach the end -- if the only way you are
25 connecting modules A and B is by linking, you are not going to

1 have a licensing obligation that flows from the GNU General
2 Public License Version 2 for module B.

3 **THE COURT:** What is linking?

4 **MR. KWUN:** So linking -- linking is a computer science
5 term. And it refers to the process of combining two modules in
6 binary form.

7 And there are two types of linking that are generally
8 discussed by computer scientists. They refer sometimes to
9 dynamic linking and sometimes to static linking.

10 And the static versus dynamic linking refers to when in
11 time the linking is going to happen, when the two binary
12 modules are going to be combined.

13 For static linking you do it ahead of time. So you
14 have -- you have your compiled code. So object code for your
15 program. And let's say it makes use of some subroutines that
16 are in a library. You have a compiled version of a library.

17 And for static linking what you basically do is you append
18 the two of them together, and then you figure out what the
19 right memory locations are for calling the routines in the
20 library. And you figure that out all ahead of time. And then
21 you ship the two of them sort of glued together as a single
22 file typically.

23 So that's static linking.

24 **THE COURT:** Can you take the -- what you just said was
25 incomprehensible. Maybe if you drew a cartoon I could

1 understand it.

2 **MR. KWUN:** I don't have a marker.

3 **THE COURT:** We have markers somewhere.

4 **MR. KWUN:** Thank you.

5 **THE CLERK:** Okay.

6 **THE COURT:** Give me an example of static linking.

7 **MR. KWUN:** So with static linking -- I'm just going to
8 call this a program. This is a program that some developer
9 writes.

10 **THE COURT:** Is that in source code?

11 **MR. KWUN:** This is compiled object code.

12 **THE COURT:** All right. Somewhere else then it's in
13 source code. Where would that be?

14 **MR. KWUN:** Source code would be in a text file
15 somewhere. You would take your text file and you would run it
16 through a compiler, and it would generate this object code.
17 0100101, whatever.

18 And then this code may rely on subroutines that are in a
19 library. So we'll say that there is a library.

20 **THE COURT:** That's the same thing as the APIs.

21 **MR. KWUN:** The APIs -- it could be a library
22 implementing APIs, yes.

23 If you like we could even, to make life simpler and
24 direct, we could say this is an API library.

25 And, again, this is compiled --

1 **THE COURT:** But separate.

2 **MR. KWUN:** -- object code. And at the moment it's
3 separate.

4 So this is also a bunch of numbers in binary. And there
5 is also some source code text file that was human readable,
6 that was run through a compiler to generate this object code.

7 So the act of linking -- static linking. So the act of
8 static linking, you connect these two -- these are in separate
9 files to start with. So when you link it, you actually connect
10 the two of them. So now you have them in a single file.

11 And inside this compiled code it refers to subroutines
12 that are in the library. But it doesn't actually know where
13 they are when -- when you compiled it. It just says, I'm going
14 to use the max method that is in the library. So it kind of
15 writes a note to itself in compiled code saying, I'm going to
16 have to figure out where that max subroutine is because I don't
17 know right now.

18 During the act of linking you would resolve those -- those
19 problems. Those blanks, essentially. So in here somewhere it
20 says, gee, where is that max routine? And during the process
21 of linking you would identify where that routine is so that
22 when you use the max routine it knows where to go in the
23 program.

24 And now you have a single file that's been statically
25 linked that resolves all of the symbols between the two in

1 terms of how they interact.

2 So the advantage to static linking is that you know ahead
3 of time that everything is working; that this library is what
4 you think it is; that it doesn't have some weird bug because
5 it's a different version of the library. Everything is going
6 to work just fine because you can test the combined code.

7 That's very good for the developer.

8 The disadvantage is if it is a commonly used library and
9 you have, you know, a hundred programs on your computer that
10 all use this library, if you're engaged with static linking
11 you're going to have a hundred copies of this library on your
12 disk. And if you're running five of those programs
13 simultaneously, you're taking up memory in your computer with
14 five copies of this library.

15 So static linking is great for resolving problems ahead of
16 time, and being sure that everything is going to work well, and
17 being sure that this code is fully compatible with this version
18 of this library (indicating). But it introduces the problem of
19 wasted space and -- both on disk and in memory.

20 So --

21 **THE COURT:** Wait.

22 **MR. KWUN:** Go ahead.

23 **THE COURT:** What are you about to go to?

24 **MR. KWUN:** I was going to discuss the alternative of
25 dynamic linking.

1 **THE COURT:** Don't go there yet.

2 **MR. KWUN:** Okay.

3 **THE COURT:** So how would the Classpath Exception apply
4 to the cartoon you drew for me?

5 **MR. KWUN:** Well, now it's probably actually useful to
6 talk about -- to answer that question, it's useful to put up
7 here what the source code versions were.

8 So we have a program source code, which is a bunch of
9 human readable text. Maybe not all humans. But readable to
10 the programmer. And we have the library source code, which is
11 also human-readable text.

12 These are in separate files. So as -- if these are stored
13 on the server as source code, they are merely aggregated. They
14 have some -- this code, without a doubt, has some text in it
15 that says, oh, by the way, I need to use something in this
16 thing called API library.

17 So it has some references to it. But just as if I write a
18 paper and I have a citation in footnote 1 that says "See
19 Magna Carta," I am not a derivative work of the Magna Carta.
20 Similarly, the fact this code has some textual references to
21 this file doesn't make these two things derivative work.

22 So these are separate files. They are combined. They're
23 combined. And before you link them, we still just have two
24 separate programs in object code form.

25 But when we link them, we attach them together. And what

1 the GPL says is, as soon as you did the linking -- as soon as
2 you did the linking where you combined these two files
3 together, you created a combined work based on both the program
4 and on the library.

5 So once they're linked, your linked code is a derivative
6 work of the program. That's not necessarily a problem because
7 you wrote the program. But it's also a derivative work of the
8 API library.

9 So if the API library was licensed to you under the GPLv2,
10 without the Classpath Exception, and you want to distribute
11 this linked module, this program, this executable program, you
12 are then going to have to provide people with the source code
13 not just for the API library but also for your program. So
14 that's without the Classpath Exception.

15 What the Classpath Exception says is, as a special
16 exception, the copyright holders of this library give you
17 permission to link this library with independent modules,
18 that's your program, to produce an executable, that's this, the
19 two of them combined, regardless of the license terms of these
20 independent modules.

21 Regardless of the license terms you apply to your program
22 (indicating). So you do not have to apply the GPLv2 license to
23 your program.

24 So -- and you can copy and distribute the resulting
25 executable -- that's this, these two things combined

1 (indicating). You can copy and distribute the resulting
2 executable under terms of your choice.

3 So you don't have to distribute this combination under
4 GPLv2. You don't have to comply with the obligations of GPLv2,
5 provided you also meet for each linked independent module the
6 terms and conditions of the license of that module.

7 So if you got this from someone else, and it says, "Every
8 time you distribute this you need to dance on Main Street,"
9 well, you're going to have to dance on Main Street before
10 you're allowed to do this.

11 They not asking you to violate the terms. And they're not
12 trying to suggest to you that you were given any freedom from
13 the terms that apply to this.

14 But if you wrote the program yourself, and you decided the
15 terms and conditions that apply, it's going to be fairly easy
16 for you to comply with your own terms and conditions.

17 That's how the Classpath Exception works with this.

18 **THE COURT:** All right. I have a question.

19 **MR. KWUN:** Yes.

20 **THE COURT:** See the bottom left red box --

21 **MR. KWUN:** Yes, Your Honor.

22 **THE COURT:** -- which is the source code?

23 **MR. KWUN:** Yes, Your Honor.

24 **THE COURT:** Let's assume that those were the 37 APIs
25 in question.

1 **MR. KWUN:** Uh-huh.

2 **THE COURT:** And let's say you made a modification to
3 that.

4 **MR. KWUN:** Yes.

5 **THE COURT:** Then what would happen?

6 **MR. KWUN:** If you made a modification to this sub
7 source code, the Classpath Exception says nothing about your
8 modifications to this source code. You would need to release
9 your modifications to this source code under the terms of the
10 GPLv2.

11 So if you modify this code, you are -- and you also
12 distribute the resulting work, you are required to distribute
13 your changes to the source code. And you are -- some other
14 requirements. You're required to note that the file has been
15 modified, for example. But you would still not be required to
16 distribute the source code for the program that links with the
17 library.

18 **THE COURT:** All right. Okay. I want to give
19 Ms. Caridis a chance to critique what you just told me.

20 What do you say?

21 **MS. CARIDIS:** So, Your Honor, in general, Mr. Kwun's
22 description of static linking I would agree with. I think he
23 did a good job explaining what static linking is.

24 He made some comments about other parts of the license --
25 for example, the mere aggregation clause -- when he was

1 talking. And those I would disagree with.

2 And if you would like, Your Honor, I put together a
3 demonstrative showing how this all applies to Android. And I
4 have cartoons for Your Honor too.

5 **THE COURT:** Wait a minute. Wait a minute.

6 One of the key questions I have for you -- why don't you
7 go over there. Walk over to the chart.

8 You see on the upper left is the source code for the
9 proprietary program?

10 **MS. CARIDIS:** Yes, Your Honor.

11 **THE COURT:** Let's call it that. And let's say that
12 the red is strictly just the 37 APIs and nothing more in source
13 code.

14 But the proprietary source code calls out lines of
15 functions like max, which will be found in the API. Mr. Kwun
16 told me that that -- that by itself would not require
17 disclosure of the proprietary source code. So is that -- do
18 you agree with that?

19 **MS. CARIDIS:** I don't necessarily agree with that,
20 Your Honor.

21 I think that would require a in-depth look at this
22 specific situation; how this code is being distributed; how the
23 rest of the GPL terms apply; and the meaning of the "mere
24 aggregation" clause, Your Honor.

25 **THE COURT:** Let's stick with the aggregation clause.

1 What would be the interpretation of the aggregation clause
2 that would require the proprietary source code to be donated to
3 the public domain?

4 **MS. CARIDIS:** So, Your Honor, the -- two things. One
5 is, when you say "public domain" --

6 **THE COURT:** Give back.

7 I thought the whole point of open source was if you use
8 this code to develop something great, you've got to give it
9 back to the public domain so other people can use it. I don't
10 know. Maybe that's too simplistic a view. But that's what I
11 thought it was trying to get at.

12 **MS. CARIDIS:** So when you say "public domain," I just
13 want to make clear that there is still a copyright on this
14 code.

15 **THE COURT:** It would still be under that copyright.

16 **MS. CARIDIS:** Yes.

17 **THE COURT:** It would go public subject to that
18 continuing copyright.

19 **MS. CARIDIS:** Yes.

20 So, Your Honor, back to the "mere aggregation" clause.

21 **THE COURT:** Yeah.

22 **MS. CARIDIS:** The Free Software Foundation, who wrote
23 the GPLv2 with Classpath Exception --

24 **THE COURT:** Yeah.

25 **MS. CARIDIS:** -- says that an aggregate consists of a

1 number of separate programs.

2 And if you want I could pass this document up to you as
3 I'm reading it so you have it in front of you.

4 **THE COURT:** Is that what they --

5 **MS. CARIDIS:** No, Your Honor. This is a frequently --

6 **THE COURT:** Different document.

7 **MS. CARIDIS:** Yes.

8 **THE COURT:** Let's see that.

9 **MR. KWUN:** Do you have a copy of that for me?

10 **THE COURT:** I've got something called, "FAQ about GNU
11 Licenses."

12 This is not back at the time in question. This is a new
13 document. Be that as it may, how does this help us?

14 **MS. CARIDIS:** If you turn to page 18, Your Honor,
15 you'll see a highlighted portion. And there are page numbers
16 at the very bottom right corner.

17 **THE COURT:** Yes. All right.

18 **MS. CARIDIS:** So this FAQ explains that an aggregate
19 consists of a number of separate programs distributed on the
20 same CD-ROM or other media.

21 So, you know, an example, if you have a copy of Microsoft
22 Word and a copy of Angry Birds and you put them on one CD-ROM,
23 and you distribute that copy, that would be a mere aggregation.
24 There are a number of separate programs.

25 But then the FAQ goes on to discuss, well, what exactly is

1 meant by two separate programs? And if you look at the third
2 paragraph under this answer that starts, "If the modules,"
3 said, "If the modules are included in the same executable file,
4 they are definitely combined in one program. If modules are
5 designed to run linked together in a shared address space, that
6 almost surely means combining them into one program."

7 **THE COURT:** Okay. Now, if they are -- so let's say
8 this is correct. How would that apply to the cartoon over
9 there?

10 **MS. CARIDIS:** So if the program source code that's on
11 the top-left corner is designed to run linked together in a
12 shared address space, as -- which is what happens once you link
13 them and they're formed into one program, that almost surely
14 means combining them into one program, which means that the
15 mere aggregation clause would not apply.

16 And just to bring this --

17 **THE COURT:** See, I've lost track. What does it mean
18 to be aggregated, again?

19 **MS. CARIDIS:** So an aggregate is two totally separate
20 programs. Microsoft Word and Angry Birds. And you put them on
21 one disk to give to your friend. And if Angry Birds was
22 somehow under the GPL, putting that on the same CD-ROM as
23 Microsoft Word would not taint Microsoft Word with the GPL
24 requirements.

25 **THE COURT:** So let's see if I have this right.

1 Let's say we were not dealing with the Classpath Exception
2 yet. We're just with Version 2. And we had the situation of
3 over there on the board. And the proprietary program called
4 out and referred to API library functions, methods.

5 So you're saying that the proprietary program would have
6 to be distributed subject to the GPLv2 license?

7 **MS. CARIDIS:** There is a chance that it would be.

8 And the reason that I say there's a chance, Your Honor, is
9 because the mere aggregation clause is the last paragraph of
10 Section 2 of the GPL. So we need to analyze everything in
11 Section 2 before we get there.

12 But if we get there and -- and at the time that we're to
13 the mere aggregation clause it appears that the proprietary
14 program would need to be distributed based on the other
15 requirements in Section 2, if the program is designed to run
16 linked together in a shared address space with the API library
17 that's covered under GPL, it would not be a mere aggregation
18 according to the Free Software Foundation.

19 **THE COURT:** Okay. I want to give you a chance to go
20 through your other.

21 But what do you say to this last point, the definition
22 from the Free Software Foundation?

23 **MR. KWUN:** So I think they're talking about something
24 different here in two ways.

25 First of all, on page 8, they're contrasting two

1 situations. They're talking about linking. That's what the --
2 if the modules are included in the same executable file or
3 designed to run linked together, that's what it's talking
4 about. But it's talking about that almost surely means
5 combining them into one program.

6 It means once they're linked, they are one program. But
7 linking happens only with the compiled code, the object code.
8 So that's the first point, is, I don't think that it's saying
9 the source code is combined into one program.

10 It says two ways to have one program. One is you put all
11 the code in the same file. So if you put all the source code
12 in the same file, they're going to say that's one program. And
13 then the other one they're saying is that if --

14 **THE COURT:** Is that the way people write programs
15 is -- I thought that they would have just had that library
16 sitting out there as a separate standalone thing, but somehow
17 it was accessible through the source code.

18 Are you suggesting that, no, they somehow cut and paste
19 from the library and stick it into their own proprietary
20 program?

21 **MR. KWUN:** If you want to use the library as intended,
22 you wouldn't do the cut-and-paste option. You would do the
23 linking. That's how libraries are designed.

24 But maybe you look at an open source library and you say,
25 I don't need this whole library. I only need one subroutine,

1 and I'm only going to call it once. So instead of attaching
2 the entire library and having the weight of the entire library
3 attached to my program, I'm just going to cut and paste the
4 code into my file.

5 And what they're saying is that if you go that route,
6 where you literally take text from one file, cut it and paste
7 it into your own file, your file then becomes a combined work
8 based on the GPL code, and you are now going to have to open
9 source your code.

10 So you can do that. That's perfectly fine. But you are
11 going to have obligations under the GPL that apply to your code
12 because you included them in the same file.

13 **THE COURT:** All right.

14 I'm going to let Ms. -- I want to keep your chart there
15 handy.

16 But you say you had a presentation to make on the
17 agreement, so let's hear your version.

18 **MS. CARIDIS:** So, Your Honor, the first page of this
19 demonstrative is just an illustration of the Android stack.
20 And this was -- a representation of this was a trial exhibit in
21 the last trial. It is from a trial exhibit in this trial.

22 We can see different components of the Android stack. And
23 for our immediate purposes, in the yellow box in the middle, on
24 the right-hand side is called an Android runtime. And the blue
25 box within Android runtime core libraries is where the 37

1 packages reside. And that is where, if Google were to use
2 OpenJDK code in Android, that is where the OpenJDK code would
3 be put.

4 So just to orient ourself within the Android stack --

5 **THE COURT:** Okay. I got it.

6 **MS. CARIDIS:** So this presentation walks through the
7 different steps of what would happen if GPL accepts -- sorry,
8 if Google accepts the GPL CE license for the Java APIs.

9 So step one, like I just mentioned, is the Java APIs under
10 GPLv2-CE are incorporated into the Android runtime box. They
11 are colored orange in this illustration to indicate that they
12 are licensed under the GPLv2-CE.

13 Section 0 -- which Mr. Kwan described before -- of the GPL
14 describes that a program is the code that is being distributed
15 under a license. So in this example, the Java APIs in OpenJDK
16 are considered the, capital P, Program.

17 **THE COURT:** I don't understand. This is assuming that
18 OpenJDK is used?

19 **MS. CARIDIS:** Yes.

20 **THE COURT:** All right. So just a minute. What does
21 "runtime" mean?

22 **MS. CARIDIS:** It is part of the Android stack which
23 includes the virtual machine and the core libraries. It's a
24 name that Google --

25 **THE COURT:** Oh, I see. All right.

1 So what is that orange -- I know it says "Java APIs," but
2 I thought the Java APIs were already in the core libraries.

3 **MS. CARIDIS:** So this is representing that we're now
4 putting OpenJDK under the classpath -- GPL with the Classpath
5 Exception libraries into runtime.

6 **THE COURT:** All right. Keep going.

7 **MS. CARIDIS:** Just so we're all on the same page in
8 terms of the language, "the Program," which is defined in
9 section 0 of the GPL, refers to the Java APIs.

10 **THE COURT:** Okay.

11 **MS. CARIDIS:** Okay.

12 **THE COURT:** All right.

13 **MS. CARIDIS:** So if you turn to the next page, the
14 GPLv2 with Classpath Exception, as Mr. Kwun described, if you
15 modify GPLv2 code, you must -- there are certain conditions
16 that apply.

17 And so Section 2 of the GPL describes what those
18 conditions are. If you modify and distribute, pardon me. You
19 can modify and tinker, you know, in your basement, in your home
20 office, and that's fine. But once you modify and distribute,
21 Section 2 applies.

22 So if you read what happens with Section 2, it says you
23 may modify your copies of the program. So, again, you may
24 modify the Java APIs, and copy and distribute such
25 modifications provided you also do the following.

1 And subparagraph (b) of Section 2 --

2 **THE COURT:** You're reading from the license?

3 **MS. CARIDIS:** I'm reading from the license, but I have
4 the exact paragraph language number at the bottom of the page
5 for your reference.

6 **THE COURT:** I see. All right. Let me read it out
7 loud. That will help me to understand.

8 "You may modify your copy or copies of the Program..."
9 What does that mean, "Program"?

10 **MS. CARIDIS:** Program is the Java APIs, capital P
11 Program.

12 **THE COURT:** "... or any portion of it, thus forming a
13 work based on the Program." All right. "And copy and
14 distribute such modifications or work under the terms of
15 Section 1 above, provided that you also meet all of these
16 conditions."

17 So this (b) is just talking about the distribute part?

18 **MS. CARIDIS:** It's on what exactly you must license if
19 you modify and distribute.

20 **THE COURT:** "You must cause any work that you
21 distribute or publish, that in whole or in part contains or is
22 derived from the Program, or any part thereof, to be licensed
23 as a whole at no charge to third parties under the terms of
24 this license."

25 Okay. So what's the problem with that?

1 **MS. CARIDIS:** So what this is saying, Your Honor, is
2 if you modify -- if Google were to modify the open JDK Java
3 APIs when it distributes Android, when it distributes the
4 Android source code, which it distributes as a whole -- let me
5 back up.

6 Google directs developers and directs OEMs to download the
7 entirety of the Android stack above the Linux kernel with one
8 click. It's located in one manifest file in the source code
9 repository of Android.

10 So that is the entire work that in whole -- that Google
11 distributes that, in whole or in part, contains the Program.
12 So the entire Android stack above the Linux kernel.

13 **THE COURT:** You mean not the red part?

14 **MS. CARIDIS:** Correct.

15 **THE COURT:** The green and blue part.

16 **MS. CARIDIS:** That is correct.

17 **THE COURT:** All right. So that gets distributed, so
18 they --

19 **MS. CARIDIS:** So that gets distributed as a whole.

20 And so under Section 2(b), the whole thing must be
21 licensed as a whole at no charge to all third parties under the
22 terms of this license.

23 This is part of the viral effect of the GPL. If you
24 distribute your source code, that in whole or in part contains
25 Program, you have to distribute the whole work under the terms

1 of the license.

2 **THE COURT:** Okay. So what's -- let's say you're
3 right. What's the problem with that?

4 **MS. CARIDIS:** So far no problem.

5 **THE COURT:** All right. Okay.

6 **MS. CARIDIS:** And because the Classpath Exception
7 comes up an awful lot in this case, the next page answers the
8 question: Does the Classpath Exception save those other parts
9 of Android as having to be distributed under the GPL license?

10 And the answer is no, because the Classpath Exception, as
11 Mr. Kwun describes, only applies to executables or object code.
12 It does not apply to source code.

13 **THE COURT:** So the -- okay. All right. So go ahead.

14 **MS. CARIDIS:** So we have Section 2(b). Says you have
15 to distribute the work as a whole under the GPL license. So
16 when Android -- when Google distributes Android as a whole,
17 those other parts of the Android stack must be distributed
18 under the terms of this license.

19 So where this becomes a problem is with the OEMs, the
20 handset manufacturers.

21 **THE COURT:** Is that the next slide?

22 **MS. CARIDIS:** Yes.

23 **THE COURT:** All right. Let's hear about that.

24 **MS. CARIDIS:** So handset manufacturers -- and this is,
25 you know-- Mr. Rubin describes this. And this is part of

1 Google's business model.

2 Handset manufacturers modify the Android source code in
3 order to create competing implementations. In order, you know,
4 for Samsung to have a special version or special flavor of
5 Android that is different from the HTC flavor, different from
6 the Motorola flavor, they modify the code of the Android stack.

7 **THE COURT:** The source code.

8 **MS. CARIDIS:** The source code.

9 **THE COURT:** How do you know it's not executable code?

10 **MS. CARIDIS:** Because -- because in order to make
11 these modifications, they are making them in source code form.

12 **THE COURT:** All right. I'll just take your word for
13 that.

14 Okay. So you're saying -- let's take Samsung. Samsung
15 will go into that orange box and modify what they want to do to
16 make it more tailored to their wishes?

17 **MS. CARIDIS:** Yes, Your Honor.

18 And so the point is, anytime an OEM makes modifications to
19 an orange box -- we established that orange means GPL code --
20 they have to make those modifications public.

21 **THE COURT:** So that's going to make them unhappy.

22 **MS. CARIDIS:** Right, Your Honor.

23 **THE COURT:** If -- at least if the emails were correct.

24 **MS. CARIDIS:** Well, and it's not only the emails, Your
25 Honor. Andy Rubin gave an interview to CNET in 2008, where he

1 explained that:

2 "The thing that worries me about GPL is this: Suppose
3 Samsung wants to build a phone that's different in
4 features and functionality than one from LG. If
5 everything on the phone was GPL, any applications or user
6 interface enhancements that Samsung did they would have to
7 contribute back."

8 So Mr. --

9 **THE COURT:** Who said that?

10 **MS. CARIDIS:** That was Andy Rubin, in an interview
11 given to CNET in 2008.

12 **THE COURT:** All right. So you've got one more page.
13 Does Classpath Exception save the OEMs? And you say no,
14 because it has to be an executable.

15 **MS. CARIDIS:** I say no for the same reason Mr. Kwun
16 said no a bit ago.

17 And that is because as soon as you modify the library, the
18 Classpath Exception doesn't save you from having to distribute
19 those modifications to the GPL code itself.

20 **THE COURT:** Well, do we know in real life whether the
21 OEMs actually did modify the API?

22 **MS. CARIDIS:** Your Honor, our technical expert,
23 Mr. Douglas Schmidt, performed a reverse engineering on a OEM
24 phone. And not only did the OEM make modifications to the
25 application framework and the hardware abstraction layer, but

1 they also make modifications directly to the APIs, the 37 APIs.

2 **THE COURT:** The 37 APIs?

3 **MS. CARIDIS:** Yes, Your Honor.

4 **THE COURT:** Is that true?

5 **MR. KWUN:** That is what their expert testified.

6 **THE COURT:** Do you have an expert to the contrary?

7 **MR. KWUN:** We don't. He did not, however, offer any
8 analysis of whether any of those changes to the API packages
9 mattered.

10 And his description of a number of them made it pretty
11 clear they didn't matter. They were things like, change the
12 time out from 10 seconds to 15 seconds. In one instance, which
13 he noted in his report -- so this is the sort of thing he
14 found -- it involved deleting code and then putting it back in.

15 **THE COURT:** Look. What's your critique of this, what
16 I just heard?

17 The point that I'm getting at, at this set of cartoons, is
18 that OpenJDK is not really going to save Google here because
19 the OEMs are not going to like the GPLv2 even with classpath.

20 **MR. KWUN:** Your Honor, the disagreement that I have
21 substantially starts on slide 3. But I just want to make one
22 clarification to slide 2.

23 **THE COURT:** All right.

24 **MR. KWUN:** Which is the orange box which is labeled
25 "Java APIs."

1 **THE COURT:** Yeah.

2 **MR. KWUN:** So, first of all, Google has around 200 API
3 packages. And using OpenJDK, they would only use it for 37 of
4 those packages. So this entire box wouldn't be the Java APIs.
5 That's point number one.

6 Point number two is, it's just for clarity --

7 **THE COURT:** Would it be Java 37 plus --

8 **MR. KWUN:** Yes, Your Honor.

9 **THE COURT:** -- your 170?

10 **MR. KWUN:** The remainder, yes, Your Honor, it would
11 be.

12 The other clarification is that -- is that what is
13 actually licensed under OpenJDK is the API packages. And I
14 just want to make that clear that when we think of the
15 packages, we're including not just the declarations but also
16 all of the implementation that comes from Open JDK.

17 That's not -- that's a clarification point. And it
18 doesn't go to the question of the license, which is really on
19 slide 3.

20 **THE COURT:** Wait, wait. So that's a good point. Let
21 me see if I understand that point.

22 Let's say that the API is modified only in the
23 implementing code but not the declarations or the SSO. Still,
24 won't the GPL say you have to make that available to the third
25 parties?

1 **MR. KWUN:** Yes, Your Honor.

2 **THE COURT:** Then what's your point?

3 **MR. KWUN:** Mostly I wanted to keep in mind that this
4 is not a specific license for the copyrighted material that's
5 at issue in this case. It's actually a license for much more.

6 But the license point is really an issue with page 3.

7 **THE COURT:** All right.

8 Go ahead. I'm on page 3. What do you say to that?

9 **MR. KWUN:** So in page 3, and in conjunction with
10 looking at page 3, slide 3, Your Honor, I'm going to be
11 referring to the GPL license. And I'm going to be referring to
12 text that's beyond that which is quoted here at the bottom.

13 **THE COURT:** So show me on -- I've got the license
14 right in front of me. What page do you want to look at?

15 **MR. KWUN:** Turning to page 2, we're going to be
16 talking about Section 2, which starts about a third of the way
17 down the page and continues down about three-quarters of the
18 way down the page.

19 **THE COURT:** Okay.

20 **MR. KWUN:** Section 2 starts by saying, "You may modify
21 your copy or copies of the Program, or any portion of it, thus
22 forming a work based on the Program."

23 So I'm going to stop right there.

24 What we are talking about here in this example is you
25 would take OpenJDK code -- Google would take OpenJDK code and

1 they would modify the OpenJDK code. That's Google's copy or
2 copies of the OpenJDK code, the API libraries. That is what
3 "the Program" here would refer to.

4 They can modify the Program, the API libraries. They can
5 modify portions of the API libraries. "Thus forming a work
6 based on the Program."

7 So we take the files that Google downloaded. They make
8 some changes inside those files. And they create a work based
9 on the program.

10 Notably, nothing in that clause refers to any code outside
11 of the OpenJDK files. They're making modifications to those
12 files. So that's the first point.

13 I'm going to -- then there's the three conditions that
14 must be met in order to copy and distribute the modifications.

15 **THE COURT:** Wait. Says, "You may modify your copy or
16 copies of the Program, or any portion of it, thus forming a
17 work based on the Program," comma. But then it goes on to say
18 "and copy and distribute such modifications or work under the
19 terms of Section 1 above provided you also meet all of the
20 following."

21 **MR. KWUN:** Yes, Your Honor.

22 And so it's saying that you can copy and distribute such
23 modification. So that is, of course, a reference to the
24 previous use and modification. That's the modifications that
25 Google made to the OpenJDK files.

1 And Google can copy and distribute its modified OpenJDK
2 files or work. And the work -- the only work that has been
3 mentioned in that sentence before the use of "or work" is
4 "forming a work based on the Program." That's the modified
5 version of the OpenJDK files.

6 So Google can distribute, I suppose, just its
7 modifications. I made the following modifications and -- and
8 I'm going to leave you the original file. And here's the
9 modifications. You can put those two together. It could do
10 that. Or it could distribute the work, which is to say the
11 actually modified OpenJDK files.

12 It can do either of those things under the terms of
13 Section 1 above -- in other words, it would have to release
14 those changes with the modified OpenJDK files under the GPLv2
15 license -- provided that Google also meets all of the following
16 conditions, (a), (b) and (c).

17 And (a) is certain notice requirements. And those are not
18 really at issue here. (c) is also a notice requirement,
19 publishing notice of the fact that this was based on this code.
20 Also not at issue here.

21 And Ms. Caridis is really focusing on Section (b).
22 Obviously, Google has to comply with (b). But before we get
23 there, after the three conditions, (a), (b) and (c), and the
24 license, it says "These requirements" -- that's referring to
25 (a), (b) and (c). "These requirements apply to the modified

1 work as a whole."

2 So "modified work as a whole," we have at the beginning of
3 Section 2, it tells us what the modified work is. The modified
4 work is the modified OpenJDK files. So it's saying these
5 requirements, (a), (b) and (c), apply to the modified work as a
6 whole. OpenJDK files.

7 Again, there is no reference to anything outside the
8 OpenJDK files. And so B says, "You must cause any work that
9 you distribute or publish, that contains or is derived from the
10 Program or any part thereof, to be licensed as a whole at no
11 charge to all third parties under the terms of this license."

12 Since we know that that requirement applies to the
13 modified work as a whole, and we know the modified work as a
14 whole is the modified OpenJDK file, what Section (b) is saying
15 is that if Google modifies the OpenJDK files, it must release
16 its modified version of those files under the GPLv2 license.

17 And, indeed, Google has done that. That's what Google did
18 in December, when it released the OpenJDK code on the open
19 source servers for the Android Project.

20 So that's Section 2. There's nothing in here that talks
21 about files that are distributed alongside the modified OpenJDK
22 files.

23 And, as a matter of fact -- and we have discussed this, so
24 I won't go in the same length. But we have a clause at the end
25 of Section 2 that tells us that, "Mere aggregation of another

1 work not based on the Program, with the Program does not bring
2 the other work under the scope of this license."

3 And if you had a source code file -- if having a source
4 code file that linked -- that once compiled was going to be
5 linked with the API libraries, if that created GPL obligations
6 for the program that gets linked, the source code for the
7 program that gets linked, that would mean every Java programmer
8 who creates a program for use with OpenJDK would be required to
9 open source their program.

10 And the very point of adopting the Classpath Exception, as
11 Oracle then Sun witnesses will testify, was to avoid that
12 outcome, to make sure that programmers were not going to be
13 required to open source their Java programs merely because they
14 linked with the OpenJDK files.

15 So it's Section 3 that tells you what happens when you
16 combine these things in binary form. That is the point at
17 which you actually combine them into one work.

18 And the source code that Google distributes on the Android
19 Open Source Project's servers is designed to be compiled,
20 linked together, and turned into an executable image for a
21 phone. That was undoubtedly what it is designed to do.

22 So you download that source code. But what you are
23 downloading is thousands upon thousands of different files.
24 Each of them are independent modules. And, yes, they are
25 designed to work together. But they don't work together until

1 you compile them and link them. And when you link them, then
2 you have created object code or executable form that is
3 subject, potentially, to Section 3 of GPLv2.

4 **THE COURT:** Now I'm so confused. I'm sorry.

5 Which is the section in this GPL that causes you to have
6 to give it back to the public domain?

7 **MR. KWUN:** That causes you to have to give your
8 changes back?

9 **THE COURT:** I thought that was your whole point on
10 number 2. And I couldn't find that. Go back over this again.

11 **MR. KWUN:** So Section 2, to the extent it applies to
12 something, it says at the end of (b) that -- that "you must
13 license your modified version at no charge to all parties under
14 the terms of this license."

15 So what that means is that if you modified the OpenJDK
16 files, if Google modifies the OpenJDK files, it must provide
17 them under the terms of this license. And the terms of this
18 license say that they have to make the source code available to
19 anyone, and they have to make that available for free.

20 **THE COURT:** All right.

21 **MR. KWUN:** That was what some people would refer to as
22 the viral effect.

23 **THE COURT:** Why doesn't that hurt Google?

24 **MR. KWUN:** It doesn't hurt Google because --

25 **THE COURT:** How do you get around it?

1 **MR. KWUN:** We don't get around it. We comply with it.

2 The way we comply with it is we release -- for Section 2,
3 what we are required to do is to release the OpenJDK files that
4 we have modified under the terms of the GPLv2 license, or the
5 GPLv2 license with the Classpath Exception. And that is what
6 we do.

7 **THE COURT:** How did you do that?

8 **MR. KWUN:** We put them on a server. And they have a
9 license text in there that says that you can -- you can take
10 these files and do what you will with them, as long as you
11 apply these terms to them.

12 So we have this exact license text in them. And, indeed,
13 after the terms and conditions of the license, in this very
14 document it explains to you how you can apply this license to
15 your own text. But we did everything that we were supposed to
16 do under the terms of this license.

17 **THE COURT:** Well, but -- all right. Stop for a
18 second.

19 **MR. KWUN:** I can explain why it doesn't affect the
20 handset manufacturers.

21 **THE COURT:** Wait.

22 **MR. KWUN:** Yeah.

23 **THE COURT:** Wait.

24 Ms. Caridis says that the OEMs are also changing the APIs
25 in source code form, and that this very provision would require

1 them to make it public.

2 **MR. KWUN:** They would be required to make the changes
3 that they make to the 37 API packages. Those changes they
4 would be required to make public. That is true.

5 They would not be required to make public, for example,
6 other programs that they write, that merely link with those 37
7 packages.

8 So, for example, if they have a different user interface,
9 that's code that is written, they don't have to change the
10 library itself. They change other code in other files. And
11 maybe they make use of the max function to help them calculate
12 the numbers they need for the user interface.

13 Or more common these days, they may say, I have a better
14 camera than our competitors. And my camera, with its new
15 features, has these additional -- has this special camera
16 application that we've written.

17 So when you get, say, a Samsung phone, there might be an
18 application on it called "Samsung Camera." And when you click
19 on that, it will execute a program that can do special camera
20 things that you can't do, say, on an HTC phone.

21 That program would link with the 37 libraries. But the
22 Classpath Exception would say you do not need to distribute the
23 source code for your camera application. So Samsung can keep
24 its whizbang camera application entirely proprietary.

25 **THE COURT:** We're running out of time, but I want to

1 give you a moment to respond.

2 **MS. CARIDIS:** So I'm not sure I understood everything
3 that Mr. Kwun was just saying.

4 But just to bring it back to the language of the license
5 itself, Section 2(b) says, "You must cause any work that you
6 distribute that in whole or in part contains the Program to be
7 licensed as a whole."

8 Google's open source licensing expert agrees -- let me
9 just read the question and answer for you:

10 "You would agree that the Android source code
11 distribution available from Google today" -- this was in
12 February, so this was after the OpenJDK publication.

13 "You would agree that the Android source code
14 distribution available from Google today in part contains
15 OpenJDK-based libraries?

16 **"A.** I would say that the OpenJDK libraries are one of the
17 many things, many different packages, many different works
18 included in the Android source code distribution."

19 So the text of paragraph 2(b) is absolutely fulfilled by
20 Android's source code distribution. They are -- they must
21 cause any work that they distribute, that in whole or in part
22 contains the Program, to be licensed as a whole under the terms
23 of this license.

24 You know, Google can make arguments about what these
25 things could have/should have meant, but this language is

1 pretty clear.

2 **THE COURT:** All right. So is that the -- is 2(b) the
3 viral effect?

4 **MS. CARIDIS:** Yes, Your Honor.

5 **THE COURT:** And then 3(a), is that also viral but at
6 the executable level?

7 **MS. CARIDIS:** That's a fair way of describing it, Your
8 Honor.

9 **THE COURT:** All right. But then that part got
10 suspended by the exception?

11 **MS. CARIDIS:** Depending on how we got to 3, it could
12 be suspended by the exception.

13 **THE COURT:** All right. Now I want to go back to my
14 list. I think we've answered 3 as good as we're going to get
15 today.

16 Number 4, "copyleft." What does "copyleft" mean?

17 **MR. KWUN:** Your Honor, I have an exhibit I can hand
18 up, but I think it's going to be helpful on this.

19 **THE COURT:** All right.

20 **MR. KWUN:** This is -- so "copyleft" is a term that was
21 created by the Free Software Foundation, who is the author of
22 the Classpath Exception, the author of the GNU licenses, and
23 it's the author of GNU Classpath. And they came up with the
24 term "copyleft." This is their explanation of "copyleft."

25 And I've highlighted some parts on here to make this go a

1 little faster. But the goal of it is to make programs free and
2 to make sure that the extended versions of a program are also
3 free. That's what it says at the top.

4 And it says, "To copyleft a program, we state that it is
5 copyrighted and then we add distribution terms." And the
6 distribution terms include what some people refer to as this
7 viral effect. But what the Free Software Foundation refers to
8 as a copyleft --

9 **THE COURT:** I got it now. I got the whole concept.
10 It's just a play on words. I see what they're getting at. All
11 right.

12 Okay. I think I know the answer to this, but number 5,
13 Does TCK apply to OpenJDK? The answer is no.

14 **MS. CARIDIS:** Your Honor, so the TCK is not a
15 requirement of OpenJDK.

16 But the same day that OpenJDK was released, it was
17 announced that users of OpenJDK could obtain a TCK license if
18 they wanted to establish compatibility with the Java platform.
19 It's not a requirement, but it's something you can and that
20 many people have.

21 **THE COURT:** It's optional.

22 **MS. CARIDIS:** Yes, optional.

23 **THE COURT:** Okay. All right. So we've already done
24 6.

25 Okay. What was the advantage -- number 7, What was the

1 advantage of the Apache license? Now, look, I understand that
2 Apache didn't have a -- I don't know what kind of license they
3 had from Sun, but I'm talking about the Apache-Google license.
4 What was the advantage of that over GPLv2 plus Classpath
5 Exception?

6 You get to answer that first.

7 **MR. KWUN:** Your Honor, there are different types of
8 open source licenses. There are some that have the copyleft
9 effect that we just discussed, and there are some that do not.
10 Those are often referred to as permissive licenses.

11 The Apache Software License is a permissive open source
12 license. What that means is that when Google releases code
13 under the Apache license, the -- it makes the code available
14 for anyone. It does not impose a requirement on its licensees
15 that if they modify that code they must make their
16 modifications public.

17 So whether you view that as an advantage or not depends on
18 your perspective. But Google wanted to enable innovation
19 without tying people up with these sorts of requirements.

20 And they published a page on why they chose the Apache
21 Software License, in which they noted that they had their own
22 reasons, because they wanted to avoid putting too many
23 restrictions on people for adopting this license.

24 And they said these aren't criticisms of LGPL -- that's
25 the library or Lesser General Public License -- or other

1 licenses. And they say they're passionate about this topic and
2 they love all free and open source licenses, and respect
3 others' opinions and preferences. "We've simply decided that
4 ASL 2.0" -- that's the Apache Software License --

5 **THE COURT:** You keep acting like the Apache license is
6 some sort of legitimate open source license. But I thought the
7 GPL was the only legitimate one.

8 **MR. KWUN:** No, there's many different open sources --

9 **THE COURT:** Wasn't Apache some kind of -- they just
10 surreptitiously went and got the code. That's what Oracle has
11 sort of convinced me of.

12 **MR. KWUN:** I would disagree.

13 **THE COURT:** What is your story on that?

14 **MR. KWUN:** Apache is just another nonprofit that
15 creates open source products. A substantial percentage of the
16 web servers run on Apache software.

17 **THE COURT:** Wasn't Sun sending them letters to cease
18 and desist, telling them they didn't have a license?

19 **MR. KWUN:** They had a dispute over the fact Apache
20 thought if they were going to release this software the thing
21 that would make it the most useful is if people could look at
22 it and say that is a Java-branded implementation. It's been
23 certified as being 100 percent compatible with the TCK.

24 And to do that, they needed to get a TCK license. That
25 was part of their goal, was to assure people that they have a

1 100 percent compatible implementation with the TCK license --

2 **THE COURT:** Did that ever happen?

3 **MR. KWUN:** They weren't able to do it because they
4 couldn't get the TCK license.

5 **THE COURT:** Why not?

6 **MR. KWUN:** Why? Because the TCK license would have
7 required them to impose a limitation on their licensees that
8 the code could not be used for mobile purposes. And that is
9 fundamentally at odds with open source software.

10 **THE COURT:** Okay. I want to see if I got this point.
11 I'm going to tell you what I think you're saying is the Apache
12 story. But I don't know. I'm asking.

13 So Apache nonprofit, they're sitting around the table.
14 They say, Let's come up with our own version of Java. And we
15 will license it to anybody who wants to use it. And they don't
16 have to give back the source code to the open source community.
17 So far right?

18 **MR. KWUN:** Correct.

19 **THE COURT:** All right. So in order to get the -- in
20 order to get to first base, though, they've got to have the
21 code, the Java code. So they can get in the car and drive over
22 there, knock on the door and say, "Give us a disk," in which
23 case Sun will say, "Sign the license."

24 Oracle's view is they can't get that code without
25 submitting to the specification license.

1 This is now back to the book and all that. Do we have the
2 book yet?

3 **MS. CARIDIS:** Yes, Your Honor.

4 **THE COURT:** Hang on. I want to come to the book. But
5 let me finish the story.

6 So then they -- they realize, here they are in the middle
7 of -- they realize they have two problems. They've got to pass
8 the TCK, and they've got to live with the GPL. They don't want
9 to live with the GPL because of the viral thing. But they
10 haven't even gotten the TCK yet.

11 So then they go to Sun and say, We want to pass the TCK.
12 And then Sun says, Fine. Come on. Here's the test. But for
13 the first time in history we're going to limit you to desktop.

14 But -- this is the part I'm asking you about. The reason
15 Sun did that -- I'm suspecting; I don't know -- is they were
16 willing to give up on the -- let anybody have it on -- give up
17 on the viral thing and allow for an exception to the GPL,
18 provided all of that was just limited to desktop.

19 I don't know. I'm going to ask you both how close that is
20 to the truth.

21 All right. How close is that to the truth?

22 **MR. KWUN:** There are some parts of that that are
23 correct. But there's some parts that the timeline doesn't
24 quite work out.

25 **THE COURT:** Tell me your version.

1 **MR. KWUN:** The Apache Harmony Project started before
2 Sun open sourced Java. And at the time they didn't take any
3 code from -- from the open source version of Java because there
4 was no open source version of Java. They wrote their own
5 implementations. They did much like GNU did.

6 **THE COURT:** I thought GNU was working on one too.

7 **MR. KWUN:** They were. They were.

8 So it's often true in the open source community that
9 there's more than one organization that is implementing an open
10 source version of the product.

11 There was, for example, multiple open source Java VMs.
12 But for the class libraries of the Apache Harmony Project --
13 Harmony being a project of the Apache Foundation. The Apache
14 Harmony Project was something they created and started before
15 there was the open source version of OpenJDK. So they didn't
16 reject the GPL license of OpenJDK because there was no GPL
17 license for OpenJDK.

18 What they did was, much like GNU, they were under the
19 impression that they could use the declarations and create
20 their own implementations, and that that would be free and
21 clear of any copyright concerns.

22 They both did this in the open. If they thought this was
23 illegal, that would have been a very strange thing to do.

24 But they relied on specifications. They developed their
25 own implementations. And then they wanted to be able to tell

1 the world that, Our implementation is now done, and you can
2 count on it being a complete implementation of J2SE, Java 2
3 Standard Edition, because we have passed the TCK.

4 At that point, they needed to negotiate over a TCK
5 license. Because without the TCK license, they were not
6 allowed to apply the Java brand and to certify that their
7 product met the compatibility standards that were designed by
8 Sun.

9 And that is when we have the whole gefuffle over whether
10 or not they were licensed under the TCK, and whether or not
11 that license would include --

12 **THE COURT:** Did Sun, at that point, know that Apache
13 planned to do something other than the GPL?

14 **MR. KWUN:** At that point, yes, Your Honor. It had
15 been -- as soon as they started developing the code, they made
16 it available to the public under the terms of the Apache
17 Software License.

18 **THE COURT:** Wait a minute. Apache developed the
19 implementing code, but started releasing it without the benefit
20 of the TCK?

21 **MR. KWUN:** Yes, Your Honor. They just did not say
22 until -- at that point, that they had passed the TCK.

23 And, actually, Your Honor, at the time that Sun announced
24 that it would be open sourcing OpenJDK, in the Frequently Asked
25 Questions they placed on their website thread a question that

1 said, "Have you been engaging with the nonSun Java SE platform
2 communities such as Apache Harmony, GNU Classpath, and Kafe?"
3 Kafe with a K, which was, I believe, a Java VM open source.

4 And they said that, "The Java developer ecosystem has a
5 lot of very smart, experienced, community-savvy people who are
6 passionate about the platform and eager to help contact with
7 these communities."

8 And there was a second question that said, "Are you
9 planning to work with these communities directly?" And Sun's
10 answer was, "The Java ecosystem can support multiple
11 implementations. Choice in differentiation keeps both
12 commercial and open source implementations on their toes. And
13 we're not expecting any of the existing open source Java SE or
14 Java ME implementation communities to close up shop now that
15 the JDK and Java implementations have been open sourced."

16 **THE COURT:** Wait a minute.

17 **MR. KWUN:** One more sentence. "It wouldn't be good
18 for Java technology if they did."

19 This was long after Harmony was available to the public
20 under the Apache license.

21 **THE COURT:** All right. Hang on one second.

22 Ms. Caridis, here's -- answer this question: Why did
23 Sun -- see, Sun had the specification license. So when Apache
24 goes and knocks on the door and says, We want this
25 specification license, and we want the TCK, we want to be able

1 to say that we're compatible, never before in the history of
2 mankind had Sun said, oh, well, that's only limited, now, to
3 desktop. But now, for the first time, they impose a new
4 condition called "limited to desktop."

5 So how did Oracle -- why did Oracle think it had the
6 right, after Apache had relied on the specification license, to
7 now suddenly say it's restricted?

8 So how do you answer -- maybe I misunderstand the whole
9 thing totally.

10 What do you say to that?

11 **MS. CARIDIS:** So, Your Honor, I don't believe there is
12 any evidence that this was the first time that Sun attempted to
13 place a field-of-use restriction on the TCK.

14 So I think the general premise of the question that this
15 is the first time --

16 **THE COURT:** Did the written document -- did the
17 specification license call out specifically Sun reserves the
18 right to do that?

19 **MS. CARIDIS:** The specification license does not say
20 that, Your Honor. The specification license merely requires
21 that an independent implementation must pass the TCK.

22 **THE COURT:** It's an interesting problem. If you think
23 about it just from the point of view of Apache for a moment --
24 and I'm assuming they are not a bunch of crooks, and they are
25 legit, and here they are, they've been relying on the

1 specification license all these years, finally they get ready
2 to go public, and they want the TCK, and Sun says, no, too
3 late, too bad, we'll give you the TCK, but only if you agree to
4 a field-of-use restriction. So that's kind of like bait and
5 switch and pulling the rug out. Maybe.

6 See, I don't know the whole -- I'm just telling you, it
7 kind of feels that way. So even if Sun had done it before, the
8 specification license should have said, We reserve the right to
9 put on a field-of-use restriction.

10 **MS. SIMPSON:** Your Honor, may I just address that?

11 **THE COURT:** Yes, of course.

12 **MS. SIMPSON:** I believe we discussed this at length
13 before, so not to retread.

14 **THE COURT:** I don't remember it if we did. Go ahead.

15 **MS. SIMPSON:** So Apache took the specification
16 license. They went and attempted to implement their code.
17 They did come back and ask for the TCK. The TCK was an
18 existing document that contained a field-of-use restriction.

19 **THE COURT:** Already?

20 **MS. SIMPSON:** It was not added just because of Apache.

21 **THE COURT:** You mean all TCKs had a field-of-use
22 restriction?

23 **MS. SIMPSON:** It did have that field-of-use
24 restriction, correct, Your Honor.

25 **THE COURT:** Already. So Apache would have known that

1 going in?

2 **MS. SIMPSON:** They should have.

3 That is why, I believe, Your Honor, it became such a big
4 conflict from the community, because everyone knew the TCK had
5 those field-of-use restrictions. And this was going to be an
6 exception to that.

7 **THE COURT:** Okay. Is that your view of it too?

8 **MR. KWUN:** No, Your Honor.

9 To find out what the terms of the TCK license were, you
10 had to go to Sun. They did not publish the terms of the TCK
11 license.

12 If you try to find the TCK license -- you can now find the
13 JCK, which is the open source version for OpenJDK. Actually,
14 I'm not even sure you can find a true, actual JCK license, but
15 you can find information about it.

16 But the actual license was not available to Apache until
17 they started negotiating for it.

18 **THE COURT:** All right. Number 8: How far along the
19 development timeline was Google when the 37 APIs became
20 available under the GPL Classpath Exception?

21 What's the answer to that?

22 **MR. KWUN:** Your Honor, when you say when the 37 APIs
23 became available under GPLv2 plus Classpath Exception --

24 **THE COURT:** It's probably going to be OpenJDK.

25 **MR. KWUN:** Yeah.

1 **THE COURT:** Let's just say OpenJDK.

2 **MR. KWUN:** OpenJDK was released on May 8, 2007. At
3 that point, Google had already retained an outside contractor,
4 Noser, with a statement of work that was formally entered into
5 in April of 2007.

6 **THE COURT:** Can I ask you about the Noser part?

7 **MR. KWUN:** Yes.

8 **THE COURT:** I thought you've been telling me all this
9 time that you got the reimplemented APIs from Apache Harmony.
10 But now you're telling me Noser did it somehow.

11 So how much did Apache do and how much did Noser do?

12 **MR. KWUN:** Noser was allowed to use any of several
13 strategies under the Statement of Work which was the agreement
14 with Google. They could write code from scratch. They could
15 use an approved open source implementation. Or they could use
16 code from Google, that Google supplied.

17 So the second of those options allowed them to use Apache
18 Harmony. And they did use Apache Harmony code for much of
19 their work.

20 So there was not a direct -- Google did not go knock on
21 Apache's door and say, "We're working on this thing called
22 Android, and we'd like to negotiate with you over a license,"
23 because Apache Harmony is an open source project, freely
24 available to anyone under terms of conspicuously placed notices
25 and licenses. So anyone can go to the Apache Harmony site and

1 get that code themselves. And all they have to do is agree to
2 follow the terms of the license that is published there.

3 So we hired -- Google hired Noser to help them with
4 getting many of the core libraries up to speed quickly, and
5 told them that they could write code from scratch, they could
6 use code from approved open source projects such as Apache
7 Harmony, or they could use code supplied by Google.

8 **THE COURT:** All right. So that was a month before?

9 **MR. KWUN:** Yeah. Discussions started with Noser
10 before that, but the actual agreement was executed in April of
11 2007.

12 You'll remember that by-- I'll remind you that by the fall
13 of 2007, Google had released its first version of Android, the
14 Android code.

15 **THE COURT:** All right. Enough on that.

16 Do you more or less agree with what I just heard on the
17 timeline?

18 **MS. CARIDIS:** Sure.

19 Just to be a little bit more precise, the Noser agreement
20 was signed on April 19th, 2007. And OpenJDK was released on
21 May 8th, 2007.

22 **THE COURT:** About three weeks difference.

23 **MS. CARIDIS:** Three weeks, right.

24 And Mr. Kwun referenced that Noser was allowed to use
25 approved open source projects.

1 So Your Honor knows, Noser asked Google, hey, can we use
2 the Classpath Project? And Google responded with, no,
3 incompatible license.

4 **THE COURT:** Okay. I keep forgetting to come back to
5 the book. Let's see the book.

6 **MS. CARIDIS:** Sure. So, Your Honor, this is the first
7 volume of the Java API specification. I'm going to hand you up
8 the one copy.

9 **THE COURT:** Show counsel first.

10 **MR. KWUN:** This was also admitted as a trial exhibit
11 in the first trial.

12 **THE COURT:** All right. I'm looking at Gosling, Yellin
13 Java Team, Java Application Programming Interface, Volume 1:
14 Core Packages.

15 All right. What page do I look at?

16 **MS. CARIDIS:** So the flagged, the page with the orange
17 tab on it.

18 **THE COURT:** Not far in there is a page with copyright
19 info. "Restricted Rights."

20 All right. So I'll read out loud. Looks like you marked
21 a paragraph.

22 "Sun Microsystems Inc. hereby grants to you a fully paid
23 nonexclusive nontransferable perpetual worldwide limited
24 license without the right to sublicense under Sun's
25 intellectual property rights that are essential to practice

1 this specification. This license allows and is limited to the
2 creation and distribution of clean-room implementations of this
3 specification that, 1, are complete implementations of the
4 specification, 2, pass all the test suites relating to the
5 specification that are available from Sun, 3, do not derive
6 from Sun's source code or binary materials, and, 4, do not
7 include any Sun binary materials without appropriate and
8 separate license from Sun."

9 Okay. What do you say to that on the Google's side?

10 **MR. KWUN:** Two things, Your Honor. First of all, this
11 is a grant of a license. It is not imposing anything on you
12 unless you want that license. So if you feel you don't need
13 that license, none of this matters.

14 This is saying they will give you something. Not they
15 won't impose a requirement. They will give you something if
16 you agree to certain terms. If you don't want to agree to
17 those terms, you just don't get what they're giving. That's
18 the first point.

19 The second point is, one of the requirements, if you want
20 that intellectual property right -- I don't have it before me,
21 so I'm going to have to paraphrase a little bit. But it says
22 that your implementation cannot derive from Sun source code
23 materials.

24 So when they wrote the specification license, they did
25 not -- plainly, they did not view the declarations as being

1 source code. Otherwise, they never would have written it that
2 way.

3 And this really just goes to the point that at the time
4 of -- relevant to our case, the industry understood that
5 declarations were not protected by copyright law.

6 Whether or not that is because of copyrightability, fair
7 use, that's a matter for the law. But what was understood in
8 the industry, included by Sun's lawyers who wrote the
9 specification license, are that declarations are not source
10 code.

11 **THE COURT:** Look. All right. I'm looking at --
12 here's one called "canRead," page 226. Which part of this is
13 the declaration and which part is the implementation?

14 **MR. KWUN:** Your Honor, I'd have to take a look at it
15 to be sure, but it probably does not actually have any
16 implementing code. It probably just has the declaration.

17 **THE COURT:** Let me hand it to you. It would be useful
18 for me -- and, frankly, you all ought to try to educate the
19 jury on this too.

20 Which part of these are the declarations and which part of
21 these are the implementing code?

22 **MR. KWUN:** Your Honor, on page 226 there's a Section
23 2.7.8. And it says "canRead." That's the name of the method.
24 That's part of the declaration. It says, "Public boolean
25 canRead, open paren, close paren." That is also the

1 declaration. It says that it returns certain conditions.

2 This is a description. This is not a part of the
3 declaring code. It's not a part of the implementing code
4 either. It's just a description of what this routine is
5 supposed to do.

6 It says that it can --

7 **THE COURT:** Which part is the declaring code?

8 **MR. KWUN:** The declaring code is definitely "Public
9 boolean canRead open paren, closed paren."

10 There is later on a reference to the fact that the canRead
11 method can throw what's known as an exception. And the
12 particular exception is "security exception."

13 That is not written in exactly the same way it would
14 appear in the declaring code. But a programmer would know that
15 if they wanted to implement this API, in addition to having
16 "Public boolean canRead open paren, closed paren," they would
17 need to have the text "throws security exception."

18 **THE COURT:** You're telling me that book does not have
19 any implementing code; it just has the declarations?

20 **MR. KWUN:** That is correct. There may be scattered
21 examples of some bits of implementing code, but as a general
22 matter it contains --

23 **THE COURT:** What was your point then about this shows
24 that they didn't think it was copyrightable? Say that point
25 again.

1 **MR. KWUN:** Yes, Your Honor.

2 In the -- in the front matter of the book that has this
3 license grant, it says, "This license allows and is limited to
4 the creation and distribution of clean room implementations of
5 this specification that," and then it has several conditions.
6 And the third condition is that "your implementations," plural,
7 quote, "do not derive from Sun source codes or binary
8 materials." So to implement -- unquote. To implement the
9 specifications that are in here, you have to include the
10 declarations. Otherwise, you are not in implementation of this
11 specification.

12 So when they said that your implementation does not derive
13 from Sun source code, the only conclusion you can reach is that
14 they did not believe that the declarations even were source
15 code.

16 Now, we have a ruling from the Federal Circuit that
17 suggests otherwise.

18 **THE COURT:** Yes, it holds.

19 **MR. KWUN:** That says otherwise. Says otherwise.

20 But the key point here is that in 1996, when Sun published
21 this book, Sun and its lawyers did not even think of the
22 declarations as source code. And that is consistent with
23 industry custom and practice at the time, which -- under which
24 computer scientists understood that one could take the
25 declarations and create your own implementing code, and that

1 that was fully consistent with copyright law.

2 Your Honor, if you would like the book back, I can hand it
3 back.

4 **THE COURT:** Could you. Is this book for me? Or is
5 that your work copy?

6 **MR. KWUN:** Probably their work copy.

7 **THE COURT:** You get to keep it.

8 **MS. CARIDIS:** Your Honor, if it was admitted in the
9 prior trial, you would have a copy of it, I believe, already.

10 **THE COURT:** I don't know where all those exhibits are.
11 Probably at the Federal Circuit.

12 (Laughter)

13 **THE COURT:** But I don't know.

14 Really, we ought to solve that problem. If you're
15 counting on us to have exhibits, we need to know where they
16 are.

17 Didn't we give the exhibits back to the parties? I'm not
18 sure.

19 **THE CLERK:** No. I believe everything was kept by the
20 Court, but I don't know where it is now in terms of the Clerk's
21 Office or another court.

22 **THE COURT:** We ought to track it down.

23 All right. What is the best usable proof that any company
24 other than Google actually released a product in reliance upon
25 GPLv2+CE and OpenJDK (or GNU Classpath)? Google's counsel

1 keeps saying in court that, quote, IBM did it. But the "it"
2 has never been spelled out. What is the actual proof?

3 Okay. So I'm all ears.

4 **MR. KWUN:** Your Honor, I'm going to hand up the
5 deposition transcript, condensed copy of the deposition
6 transcript from the 30(b)(6) deposition of IBM as a third
7 party. Do you need a copy?

8 We took a third-party deposition of IBM.

9 **THE COURT:** Hang on a minutes. My court reporter
10 needs a break. We're going to take about -- let's take a
11 10-minute break. I only have about 30 more minutes when we
12 come back.

13 (Recess taken from 11:41 to 11:54 p.m.)

14 **THE COURT:** Okay. Back to work. I don't have too
15 much more time, so make your point. I have your transcript.
16 What is your best point here?

17 **MS. CARIDIS:** Your Honor, may I interrupt quickly?

18 **THE COURT:** Yeah.

19 **MS. CARIDIS:** I think I can shortcut this entire thing
20 by playing you one short deposition transcript from this exact
21 depo that I think might shortcut this entire conversation.

22 **THE COURT:** If it shortcuts it, go ahead.

23 (Video played.)

24 **MS. CARIDIS:** Your Honor, that's IBM's corporate
25 representative who just testified that IBM always had its own

1 separate license with Sun and later with Oracle.

2 IBM has a separate license with Sun and Oracle for the
3 copyrighted material here, apart from anything that it might
4 have been doing with Apache.

5 **THE COURT:** Maybe that's a very good point.

6 What do you say to all of that, Mr. Kwun?

7 **MR. KWUN:** Your Honor, we don't have the license in
8 evidence. It's not on anyone's exhibit list.

9 Saying there's a license tells you nothing about what the
10 terms of that license are and how it applies to other --

11 **THE COURT:** Maybe Oracle has got it somewhere, and
12 they could show it to us. I'm sure they do.

13 All right. What is your point on this transcript?

14 **MR. KWUN:** Two points. One is, there's some testimony
15 about IBM using the Apache Harmony Project, and then there's
16 some later testimony saying that they switched from Harmony to
17 OpenJDK.

18 So read together that gets at the Court's point of whether
19 or not OpenJDK has been used commercially. And it identifies
20 specific products.

21 Page 38 of the transcript, Your Honor, page 11 of the
22 document, but page 38 of the transcript pages, starting at line
23 12, the question is:

24 **"Q.** Has IBM ever used source code derived from the Apache
25 Harmony Project in its products?

1 **"A. Yes."**

2 And you can read along if you want, but to keep things
3 short, if you go to page 39, at line 7, he identifies one
4 product as the application server. Excuse me. At line 16 he
5 identifies additional products as *Lotus* notes, IBM Commerce,
6 and says there's lots and lots of products. So that's where
7 he's talking about using Apache Harmony.

8 And then, Your Honor, if you turn to page 100 of the
9 transcript, he talks about, at line -- starting at line 14, at
10 the end of that, that:

11 "Between that time and when we released Java 7, we
12 changed where we were doing our open source work from
13 Harmony to OpenJDK."

14 So the products that had previously been using Apache
15 Harmony code, after that switch would be using Open JDK code.

16 And just to keep things short, that's the testimony I
17 would cite to you, Your Honor.

18 **THE COURT:** All right. Thank you.

19 And your point to this is -- Ms. Caridis, is that there
20 was a separate overarching umbrella license that made all of
21 this moot?

22 **MS. CARIDIS:** Yes, Your Honor.

23 **THE COURT:** If you have that license, it would be
24 useful to see.

25 **MS. CARIDIS:** Your Honor, it was produced during the

1 first phase. I don't have it with me here, Your Honor.

2 **THE COURT:** If it's there somewhere, we can find it.

3 **MS. CARIDIS:** Your Honor, I would also point out that
4 the IBM representative testified, on pages 69 through 72, that
5 they never used the full 37 API packages here. They used, at
6 most, 10. And I don't believe they ever used any API packages
7 from Java 1.4 or Java 5, which are the copyrighted works at
8 issue. It's all about 6, 7 and 8.

9 **THE COURT:** All right. Thank you.

10 Okay. So number 10: Google wishes to present evidence
11 that it thought the items in question were not copyrightable.
12 How can we get into that without explaining the appellate
13 holdings that came later?

14 Don't we have a stipulation that you're not going to get
15 into any of that?

16 **MR. KWUN:** Your Honor, I have a proposal that,
17 hopefully, would address this.

18 **THE COURT:** What's that?

19 **MR. KWUN:** We don't need to elicit testimony about
20 statements of laws about things being copyrightable or about --
21 you know, words of those type, we won't elicit that testimony.

22 We do think it's appropriate that people should be allowed
23 to testify what they believed or what they understood was okay
24 to do, whether it was acceptable or whether it was consistent
25 with industry custom and practice. Those sorts of things. But

1 we don't need to elicit testimony that they thought it was,
2 quote, copyrightable or not copyrightable.

3 **THE COURT:** Well, I don't know about the -- I'm not
4 blessing your proposal. And I'm not saying no to it. But what
5 you're telling me is you're not going to elicit the testimony
6 here, anyway, so it's moot for this point.

7 But there's a big issue of how much of that alleged custom
8 evidence ought to come in.

9 **MR. KWUN:** Your Honor, also --

10 **THE COURT:** I don't know the answer to it. I've been
11 going back and forth on it in my own mind as to what the right
12 answer is. But we don't have time to debate that one right
13 now. We've already debated it. At some point I'm just going
14 to make a decision.

15 I had some other questions for you.

16 **MS. HURST:** Your Honor, may I respond briefly on that
17 one?

18 **THE COURT:** All right.

19 **MS. HURST:** If contrary to the current intention --

20 **THE COURT:** What current intention?

21 **MS. HURST:** We agree that testimony should not be
22 elicited.

23 **THE COURT:** All right.

24 **MS. HURST:** If it is, Your Honor, then we would
25 request an immediate limiting instruction. In other words, if

1 a witness comes on and says, "I didn't believe this was
2 copyrightable," we agree that should not happen. And hopefully
3 that's not going to happen, in light of Mr. Kwun's
4 representation. But if it were to happen, we would request an
5 immediate limiting instruction that:

6 "The Court has instructed the jury that the APIs are
7 copyrightable and that is the law applicable in this
8 matter."

9 **THE COURT:** Well, all right. Maybe I would do that.
10 But what is a fairness thing here is it probably is true that
11 Mr. Rubin -- what's his name?

12 **MR. KWUN:** Mr. Rubin.

13 **THE COURT:** -- really did believe back then, because
14 there was no law that said to the contrary, that these were not
15 copyrightable. That's what the whole first round was about.

16 It turns out he's wrong. But if he had known then that he
17 couldn't go down that path, he might have gone down the other
18 path.

19 And then you're going to argue that he was just the most
20 willful violator in history because he should have known that
21 it was copyrightable when it's hard to know back then.

22 **MR. KWUN:** And that, Your Honor, if they do open the
23 door --

24 **THE COURT:** You've already stipulated you're not going
25 to get into the Federal Circuit decision. I don't know if I

1 would have made that stipulation, but you all have made it.

2 Another way to go would just be explain everything to the
3 jury. Just say I held it was not copyrightable. Three judges
4 on the Federal Circuit disagreed with me. And that is the law.
5 But that was not yet known at the time of the events in
6 question. And the jury found that you did infringe.

7 I don't see what's so devastating about letting the jury
8 know what's happened in the prior -- but you have stipulated.
9 I'm not taking away your stipulation. It's just I see problems
10 as we try this case.

11 Both of you are going to want to tell the jury something
12 about what happened.

13 **MR. KWUN:** And, Your Honor, if they open the door to
14 testimony about our witnesses' state of mind at the time, by
15 suggesting they actually did know it was copyrightable, in that
16 situation then I think what we should be allowed to elicit in
17 testimony would change. But that would --

18 **THE COURT:** Well, that would be a fraud on the jury.

19 Ms. Hurst, if you were to try to show Mr. Rubin knew good
20 and well it was copyrightable, you can't do that.

21 **MS. HURST:** Well, Your Honor, we have here Trial
22 Exhibit 18, where Mr. Rubin wrote, "Wish them luck. Java.lang
23 APIs are copyrighted."

24 Here it is, Your Honor, right in Mr. Rubin's own words.
25 I'm going to circle it and hand it up. Trial Exhibit 18.

1 **THE COURT:** I believe you read it right. But
2 "copyrighted" is not the same as "copyrightable."

3 But there we are.

4 **MS. HURST:** I mean, we do absolutely intend, Your
5 Honor, to get into the fact that they knew the APIs were
6 copyrighted and that they knew they needed a license as part of
7 the good-faith-bad-faith element of fair use.

8 **THE COURT:** All right. Okay. I just promise you
9 there's going to be a point in all of that where one of you is
10 going to want to point out the actual history here of what was
11 known at the time versus what happened later.

12 I don't think I ever signed your stipulation. Did I ever
13 order that? Maybe I did. I don't remember. But I know you
14 stipulated to it.

15 I've seen enough trials and I've seen enough of this case,
16 there's a 50/50 chance that both -- that one or both of you are
17 going to feel you are being treated very unfairly by that.

18 I'm not going to let something that is a gross injustice
19 happen. So just be aware that if it turns out that I need to
20 tell the jury about the history of this case, I'm going to do
21 it. If, in my judgment, fairness and justice require that, I'm
22 going to do it. And I'm not going to let anybody create a
23 false impression with the jury. So you just take that to
24 heart.

25 To what extent is the classpath -- okay. My mind is too

1 soggy now. I'm not going to go into any more of this.

2 I do want you to know that this was very helpful to me
3 today. And you both did a great job of explaining your
4 positions. And your cartoons were most helpful.

5 (Laughter)

6 **THE COURT:** I think -- okay. I'm not going to get
7 into anything else. I've got to go back and work on some of
8 the orders I owe you. But they are not all going to be done in
9 time.

10 So you're going to have problems with your opening
11 statements, maybe, because I won't be able to tell you whether
12 or not something is in evidence or out of evidence. And it's
13 your own fault.

14 Some of those motions that you made, that I spent page
15 after page after page on, I now look back on and say that was a
16 worthless exercise. I could have been spending that valuable
17 time on some of these that mean a lot more. Like, what we've
18 been talking about today means a lot more than some of those BS
19 motions in limine both sides made.

20 But I didn't know which ones were the important ones then.
21 I had to go through them one at a time. And you all deserve
22 what you're going to get. You're going to have your hands tied
23 a little bit in your opening statements.

24 I know that's what you're standing up for; right? You
25 want me to rule on something so you can say it in the opening

1 statement.

2 **MR. BICKS:** I was actually just listening.

3 **THE COURT:** All right.

4 (Laughter)

5 **THE COURT:** Good. Because then I'm just telling you,
6 I tried a lot of cases. And when I didn't know exactly -- you
7 never know what is going to happen.

8 You have to be careful in your opening statement because
9 you cannot have any guarantees as to what's going to come into
10 evidence and not into evidence. And if you go out on a limb
11 and say that Mr. Chatterjee's thing is coming into evidence,
12 and it doesn't, then you just made a false promise to the jury.
13 It's your own fault.

14 You have to know that I can't rule on everything in
15 advance. I'm trying hard to get an order out on that, but I
16 cannot promise you it's all going to be done in time. So most
17 of what you served up to me I have ruled on. And that's pretty
18 remarkable given what I'm up against here.

19 All right. Thank you. I'm not going to be here tomorrow
20 so there won't be any emergency motions. Come the end of
21 today, I'm out of this case until Monday morning. So don't
22 file any emergency motions thinking I'm going to be able to
23 look at it, because I'm not.

24 So I will see you Monday morning. Good luck to both
25 sides.

1 (Counsel thank the Court.)

2 (At 12:07 p.m. the proceedings were adjourned.)

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6 CERTIFICATE OF REPORTER

7 I certify that the foregoing is a correct transcript
8 from the record of proceedings in the above-entitled matter.

9

10 DATE: Friday, May 6, 2016

11

12 *Katherine Sullivan*

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15 Katherine Powell Sullivan, CSR #5812, RMR, CRR
16 U.S. Court Reporter

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